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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

71-121

PRO-FOOTBALL, INC., NATIONAL FOOTBALL LEAGUE, DISTRICT OF COLUMBIA ARMORY BOARD, ET AL.,
Petitioners,

v.

NORMAN F. HECHT, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.

NORMAN F. HECHT, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in its case No. 24,446, entitled *Hecht et al.* v. *Pro-Football, Inc., et al.*

OPINIONS BELOW

The opinion of the District Court is reported at 312 F. Supp. 472 and is reproduced as Appendix A to this Petition (pp. 1a-10a, *infra*). The opinion of the Court of Appeals is not yet reported; it is reproduced as Appendix B to this Petition (pp. 11a-43a, *infra*).

JURISDICTION

The judgment of the Court of Appeals (Appendix C, p. 44a, *infra*) was entered on April 27, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a violation of the Sherman Act can be predicated on the execution and performance of a contract between a government agency and a private party, negotiated at arm's length without fraud, misrepresentation or overreaching on either side, with respect to the use of a public facility the control and management of which Congress has entrusted by statute to the government agency "without regard to any other provision of law."

STATUTES INVOLVED

Sections 1, 2 and 3 of the Sherman Act and pertinent provisions of the District of Columbia Stadium Act are set forth in Appendix D to this Petition (pp. 45a-48a, *infra*).

STATEMENT

In 1957 Congress authorized the Armory Board, a government agency,[1] "to construct, maintain, and operate a stadium" so as "to provide the people of the District of Columbia with a stadium suitable for holding athletic events and other activities and events of a nature requiring such a facility . . . ." District of Columbia Stadium Act § 2, 71 Stat. 619, 2 D.C. Code

[1] The Armory Board was established by Congress in 1948. 62 Stat. 339, 2 D.C. Code § 1702.

§ 1720. The enabling statute was amended in 1958 and 1959 and in its final form authorized construction of the stadium on land to be acquired by the Department of the Interior, by condemnation if need be, with construction to be financed by bonds issued by the Armory Board. *Id.* §§ 2, 3, 4, 2 D.C. Code §§ 1720, 1721, 1722. The Department of the Interior was directed to enter into a contract with the Armory Board for the construction, maintenance and operation of the stadium. *Id.* § 3, 2 D.C. Code § 1721. The Board was given the broadest of discretion in carrying out its functions under the statute:

> "In order to carry out the purposes of this subchapter, the Board is authorized without regard to any other provision of law, but subject to any contract entered into with the Secretary of the Interior under section 2-1721—
>
> "(1) to determine all questions concerning the use of the stadium for the purposes of this subchapter;
>
> ". . . .
>
> "(8) to rent or lease from time to time for any of the purposes of this subchapter, all or any part or parts of the stadium including any or all structures, equipment or facilities of the stadium, at such rental values and for such periods of time as the Board shall determine . . ." *Id.* § 5, 2 D.C. Code § 1723.

Throughout the period in which the stadium legislation was being considered it was accepted that the success of the stadium venture depended on making appropriate long-term arrangements for the use of the stadium by Washington's two major league profes-

sional athletic teams, the Washington Senators and the Washington Redskins.[2]

Construction of the stadium, first known simply as D.C. Stadium and since 1968 as Robert F. Kennedy Memorial Stadium, began in 1959, and the stadium was opened in 1961.

On December 24, 1959, the Armory Board and the Redskins, after what the Court of Appeals described as "arm's-length, hard bargaining between the two parties for approximately a year and a half" (p. 14a, *infra*), entered into an agreement under which the Redskins committed themselves to rent the stadium for their home games beginning with the 1961 season and continuing for 30 years. The Board, in turn, agreed not to rent the stadium to another professional football team during the term of the lease.

The respondents are individuals who claim to have been promoters seeking a professional football franchise for Washington in a league other than the Redskins' league, the National Football League. They claim to have been thwarted by their inability to obtain from the Armory Board permission to use D.C. Stadium (as it then was) because of the exclusivity provision of the Board's lease agreement with the Redskins. The respondents brought a suit under Sections

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[2] 104 Cong Rec. 13787 (1958); 103 Cong. Rec. 6826 (1957); see pp. 8a-9a & n.9, *infra*. As amended in 1958, the Stadium Act directs that the stadium be "constructed substantially in accordance with the plans for such stadium contained in the Praeger-Kavanagh-Waterbury survey entitled 'Engineering and Economic Study, District of Columbia Stadium' dated March 31, 1958." § 2, 2 D.C. Code § 1720. The study referred to was based on the expectation that the Senators and the Redskins would be the chief sources of revenue. Pp. 3, 57, 80-85.

4 and 16 of the Clayton Act, asking treble damages for and injunctive relief against alleged violations of Sections 1, 2 and 3 of the Sherman Act. The defendants who remain in the case, the petitioners here, are Pro-Football, Inc., the corporate name of the Redskins, the National Football League and the Armory Board and its members. They are accused of contracting and combining in restraint of the business of professional football and of monopolizing and attempting to monopolize that business.

The factual allegations on which the foregoing Sherman Act charges are based relate solely to the inclusion of the exclusivity provision in the agreement between the Armory Board and the Redskins and the enforcement of the provision to deny respondents the use of the stadium.[3] "There is no contention," the Court of Appeals said, "that there was any fraud, misrepresentation, or overreaching on either side." (P. 14a, *infra.*)

The District Court granted the petitioners' motion for summary judgment. It reasoned that "no violation of the [Sherman] Act can be made out even where there is a restraint upon trade or monopolization if it resulted from valid governmental action." (P. 10a, *infra.*) The Court of Appeals reversed, holding that, even though the Armory Board-Redskins lease represented action of a governmental entity, its terms were subject to scrutiny under the antitrust laws

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[3] There is no factual allegation independent of the contract on which liability on the part of the National Football League is sought to be predicated. There were at one time additional counts relating to the merger of the NFL and the American Football League, but those were dismissed by consent.

and could be the basis for finding an antitrust violation. The court said that the lease "must be tested in accordance with the United States antitrust laws as usually applied to contracts between private parties." (P. 43a, *infra*).

REASONS FOR GRANTING THE WRIT

The decision below is on an important question of antitrust law in an area in which there is a wave of current litigation that is significant both for the development of antitrust doctrine and for its potential unsettling effect on the way governments and private businesses conduct their affairs. The respondents themselves told the Court of Appeals that "the issue raised by this appeal," which is the issue presented by this Petition, "is of great public importance because of the effect the decision will have on a large part of the economy." (Reply Brief, p. 1). The decision of the Court of Appeals was that the government lease involved in this case must be subjected to the same antitrust scrutiny as a wholly private contract. If given general effect, that decision would bear heavily upon the numerous units of government and agencies within those units that perform their public functions in whole or in part through contracting with private firms. Heretofore it has been understood that public contracts are not judged by the standards of the antitrust laws—that the antitrust laws are simply inapplicable to them. Two courts of appeals have so held. The decision below, which stands alone, is in conflict with the decisions of those courts as well as with the general understanding.

More broadly, the decision below is inconsistent with decisions of this Court that have delimited the role of

the antitrust laws in relation to valid governmental action and to private action associated in some way with governmental action. Some confusion, evidenced by this case and others, has lately marked decisions of the courts of appeals applying the rule of those cases. This Court has recognized the need for clarification by granting review of a decision of the Court of Appeals for the Ninth Circuit that, like the decision below, would constrict the area surrounding governmental action in which the antitrust laws are inapplicable. This case is appropriate to be heard with that one, *California Motor Transport Co.* v. *Trucking Unlimited,* now pending on writ of certiorari, No. 70-92, O.T. 1971.

I.

The conflict is square between the decision below and the decision of the Court of Appeals for the First Circuit in *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F.2d 52 (1st Cir. 1966), *cert. denied,* 385 U.S. 947 (1966), as well as the decision of the Ninth Circuit in *Sun Valley Disposal Co.* v. *Silver State Disposal Co.,* 420 F.2d 341 (9th Cir. 1969).[4] The nature of the conflict and importance of the issue to which it relates can best be understood by consideration of the following background:

The public contract is an increasingly important instrument of government. It is used on all levels of government, federal, state and local, and by all kinds of governmental agencies and departments.[5] It is used

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[4] In accord with the courts of appeals' decisions is Heath v. Aspen Skiing Corp., 1971 Trade Cas. ¶ 73,560 at 90,345 (D. Colo. 1971).

[5] In 1967, there were more than 81,000 local governments in the United States. U.S. Bureau of Census, 1967 Census of Governments, vol. V, at 1-2 (1967).

to acquire multi-billion dollar weapon systems [6] and to operate public housing projects; [7] to grant federal subsidies to shipping companies [8] and to provide college and university facilities; [9] to develop atomic power [10] and to purchase clothing.[11]

In many instances public contracts would raise serious questions under the antitrust laws if those laws were considered applicable to them. Governments often seek and obtain price concessions not available to other purchasers of goods or services.[12] Governments sometimes enter into price-fixing agreements [13]

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[6] In fiscal 1970, military prime contracts awarded by the Department of Defense after receipt of two or more responsive offers for competitive price, design or technical proposals totaled $14,696,000,000. In the same fiscal year, the Department entered into 177,688 procurement actions (awards of or changes in prime contracts) of $10,000 and over. Office of the Secretary of Defense, Military Prime Contract Awards, July 1969-June 1970, at 34, 50 (1970).

[7] Better Home Heat Council, Inc. v. Housing Authority of Hartford, 148 Conn. 536, 172 A.2d 610 (1961).

[8] Moore-McCormack Lines v. United States, 413 F.2d 568 (Ct. Cl. 1969).

[9] Tilton v. Richardson, 39 U.S.L.W. 4857 (U.S. June 28, 1971).

[10] Owens-Corning Fiberglas Corp. v. United States, 419 F.2d 439 (Ct. Cl. 1969).

[11] L.W. Foster Sportswear Co. v. United States, 405 F.2d 1285 (Ct. Cl. 1969).

[12] The Robinson-Patman Act has been said not to be applicable to contracts of the federal government. 38 Ops. Att'y Gen. 539 (1936).

[13] Ventura Port Dist. v. Taxpayers, 53 Cal. 2d 227, 233-25, 347 P.2d 305, 310-11 (1959); compare Rough Diamond Co. v. United States, 351 F.2d 636 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 957 (1966).

and requirements contracts.[14] Governments quite often contract, as the Armory Board did here, to give a private entity exclusive rights to use government property commercially.[15] And they bar private parties from contracting or otherwise dealing with government agencies.[16]

In none of these instances or others that may be supposed has it been thought that contracts of government agencies are to be judged by the standards of the antitrust laws as applied to dealings between private parties. The rule as to government contracts is an aspect of the general rule that the antitrust laws are not applicable to valid governmental acts. *Parker* v. *Brown,* 317 U.S. 341 (1943).[17] (See pp. 16-17, *infra*). This is not to say that statutes governing the contracting authority of particular government agencies may not contain provisions such as direc-

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[14] Compare Vicksburg Waterworks Co. v. Vicksburg, 185 U.S. 65 (1902), with Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320 (1961).

[15] Friend v. Lee, 221 F.2d 96 (D.C. Cir. 1955); Panama City v. Seven Seas Restaurant, Inc., 180 So.2d 190 (Fla. App. 1965); Hertz Driv-Ur-Self System, Inc. v. Tucson Airport Authority, 81 Ariz. 80, 299 P.2d 1071 (1956).

[16] Compare Gonzalez v. Freeman, 334 F.2d 570 (D.C. Cir. 1964), with Silver v. New York Stock Exchange, 373 U.S. 341 (1963).

[17] In Parker v. Brown, 317 U.S. 341, 351-52 (1943), the Court, in making the point that it was dealing with sovereign, state, governmental action (see pp. 16-17, *infra*), said that "the state . . . made no contract or agreement and entered into no conspiracy in restraint of trade or to establish a monopoly. . . ." This language has not been taken, even by the court below, which quoted it, as an indication that every public contract is properly to be scrutinized to determine whether it imposes an illegal restraint or otherwise violates the antitrust laws. At the very most it leaves open the question posed by this case, which should now be answered.

tions to engage in competitive bidding.[18] But the existence in government contract statutes of particular provisions dealing with competition does not qualify the general rule that the antitrust laws are inapplicable to public contracts. When the legality of a public contract is brought in question, the issue is whether in its terms and in the procedures followed in nego-

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[18] The D.C. Stadium Act is an example. The Court of Appeals noted that one of the provisions of the Act, the provision authorizing the Armory Board to acquire and dispose of equipment and other property, requires competitive bidding on contracts of more than $3,000. § 5, 2 D.C. Code § 1723. (Pp. 38a-39a, *infra*.)

This is the same section of the statute that authorizes the Armory Board to act in respect of the stadium "without regard to any other provision of law." If the issue in the case is regarded as a question of construction of the Stadium Act rather than the Sherman Act, the specific subjection of larger property acquisition contracts to a competitive bidding requirement is significant as a demonstration that Congress understood that "without regard to any other provision of law" meant that usual restrictions on government procurement were inapplicable. On the face of things, there is no reason to suppose that it would have a different understanding as to the applicability of the antitrust laws.

But the Court of Appeals reasoned to an opposite, illogical conclusion. It found in the specific competitive bidding requirement a general Congressional attitude favoring competition on larger contracts that, the court said, made it difficult to comprehend why Congress, having this attitude, should have been "anti-free competition" in regard to "the largest and most important contracts—for long-term rental . . . ." (P. 39a, *infra*.) The difficulty is of the Court's own making, brought about by inferring far too general a policy from the very specific competitive bidding provision. Not only is the Court of Appeals' reasoning dubious but its premise is unsound. Congress manifested no such pro-competition attitude with respect to large contracts as the Court of Appeals attributed to it. The Armory Board's largest single contract would presumably be the contract for construction of the stadium, and another section of the Act specifically authorized the Board to "provide for the construction of . . . [the] stadium by such means as it determines will most effectively carry out this Act (including, but not limited to, a negotiated contract)." § 2, 2 D.C. Code § 1720.

tiating or awarding it the contract comports with the contracting agency's statutory authority—not whether if it were a contract merely between private parties any of its provisions would be held repugnant to the antitrust laws.[19]

Municipal stadiums are among the public facilities that are the subjects of contracts with private parties for their use. See *Martin* v. *Philadelphia,* 420 Pa. 14, 18, 215 A.2d 894, 896 (1966). The operation of municipal stadiums is a public or governmental function and not a proprietary function—if that outmoded distinction is indulged. *Ibid.*[20] Many professional football teams play their home games in municipally owned stadiums.

Congress determined that the District of Columbia should have a municipal stadium. It authorized the Armory Board, a government agency, to construct, operate and maintain a municipal stadium and empowered it, "without regard to any other provision of law," to determine all questions concerning the use of the stadium and to rent or lease the stadium for such periods of time as it might determine. Pursuant to this authority the Board (1) decided that the stadium should be used during football season by

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[19] Acts that tend to defeat the very purpose of competitive bidding may incur antitrust liability. There is of course no antitrust immunity for collusive bidders on government contracts. And acting through public employees to rig specifications to favor one bidder over another has been held an antitrust violation. George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970), *cert. denied,* 400 U.S. 850 (1970).

[20] In New York v. United States, 326 U.S. 572, 583 (1946), the opinion announcing the judgment of the Court spoke of "such untenable criteria as 'proprietary' against 'governmental' activities of the States." A majority of the Court agreed with this view. See *id.* at 586, 591.

the Washington Redskins for their home games (and for college and high-school games as well)[21] and (2) entered into a lease agreement with the Redskins which provided that at no time during the 30-year "term of this Lease Agreement shall the Stadium be let or rented to any professional football team other than the Washington Redskins."

The Court of Appeals held that the exclusivity provision of the contract may be the predicate for finding that the Armory Board, the Redskins and the NFL have violated the antitrust laws. The potential of antitrust liability arises, the court said, because Congress did not say "including the antitrust laws" when it empowered the Armory Board to deal with the stadium "without regard to any other provision of law" or state in the antitrust laws themselves that they do not apply to contracts of the Armory Board. The decision is unprecedented. No court has ever previously held that any such specific Congressional exemption is necessary to avoid antitrust coverage of public contracts. To the contrary, the general understanding has been that it would take specific Congressional action to subject public contracts to the antitrust laws.[22]

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[21] There is no restriction on college and high-school football games except that they may not be scheduled the day before Redskins' home games without the Redskins' consent; consent has been freely given.

[22] On the Court of Appeals' standards, many Department of Defense and NASA contracts could well be subject to the antitrust laws. The Armed Services Procurement Act, granting these agencies their contracting authority, specifies the laws that are inapplicable to agency contracts without including the antitrust laws, 10 U.S.C. § 2314, and competitive principles were intended to control the great bulk of contracting under the Act. S. Rep. No. 571, 80th Cong., 1st Sess. 1-6, 12-13, 15-16 (1947); H. R. Rep. No. 109, 80th Cong., 1st Sess. 3-6 (1947).

As indicated above, two courts of appeals have made this general understanding explicit. They held that the antitrust laws do not cover public contracts in cases involving contracts challenged, like the Armory Board-Redskins lease, because of exclusivity provisions. The decision below is squarely in conflict with those decisions, which so far as we are aware were the only reported decisions on the precise issue until the court below decided this case.

In *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F.2d 52 (1st Cir. 1966), *cert. denied,* 385 U.S. 947 (1966), the Port Authority contracted with a private company for the latter to supplant two other companies and become the sole fixed-base operator at Logan Airport in Boston, providing fuel and maintenance service and the like to those using the airport. An antitrust suit was brought by one of the former fixed-base operators, naming the Port Authority and the new operator. The court held that no suit lay. In terms that could be applied to the Armory Board and its lease agreement with the Redskins, the court said:

> "By statute [the Authority] has been constituted a public instrumentality and the exercise of the powers conferred upon it is deemed and held to be the performance of an essential governmental function. It also has wide powers, many of which are bestowed only upon instrumentalities of government.
>
> * * *
>
> "In carrying out its responsibilities the Authority decided that it was necessary to have only one fixed base operation at Logan and pursuant to that decision, entered into the lease with [the chosen fixed base operator]. It is clear that in doing so

> it was acting as an instrumentality or agency of the state, pursuant to the legislative mandate imposed upon it to operate and manage the airport and establish rules and regulations for its use . . . . What was done here was in the exercise of a valid governmental function. The antitrust laws are aimed at *private* action, not at governmental action." 362 F.2d at 55.

As for the defendants other than the Port Authority, the court noted that their only conduct alleged to be in violation of the antitrust laws was their dealings with the Port Authority. (Similarly, the only violative conduct alleged in this case is the transaction between the Armory Board and the Redskins.) The court held that in the circumstances "it would be an unreasonable restriction on . . . [the Authority's] freedom to hold that the other defendants acted illegally in having aided it." *Id.* at 56.

The second case is *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969). One of two companies was awarded by a Nevada county commission an exclusive contract to pick up and dispose of the county's garbage. The company that did not receive the contract complained under the antitrust laws. The Court of Appeals affirmed summary judgment for the defendant on the ground, *inter alia,* that the antitrust laws were inapplicable to the exclusive agreement, the execution of which by the county commission had been authorized by the Nevada legislature.

Those two cases, and particularly the *Wiggins* case, are indistinguishable on any tenable legal ground from this one. The court below attempted to distinguish the *Wiggins* case on the ground that the Port Authority itself might have provided airport services whereas

the Armory Board could not be expected to own and manage the Redskins. The significance of the distinction is difficult either to comprehend or to accept. There is very little today that governmental bodies cannot directly do—run school systems, provide school lunches, operate factories, lease warehouses, manage municipal auditoriums or provide public entertainment. In any event, the distinction is beside the point. The Armory Board's contract with the Redskins was plainly pursuant to its statutory authority to operate the stadium. It was a governmental act based upon the Board's determination of a question concerning the use of the stadium, a determination that Congress made the sole responsibility of the Board. No more and no less was the decision of the Massachusetts Port Authority to contract for airport services an exercise of its power under its governing statute.

The rationale of the *Wiggins* case is that "the antitrust laws are aimed at *private* action, not at governmental action." See *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 135 (1961); *Parker* v. *Brown*, 317 U.S. 341, 350-51 (1943); *Apex Hosiery Co.* v. *Leader*, 310 U.S. 469, 491-94 & n.15 (1940). That rationale is fully applicable here.

The decision below is in irreconcilable conflict with the First Circuit's *Wiggins* decision (and with the Ninth Circuit's decision in the *Sun Valley Disposal* case as well). This Court should resolve the conflict. The question of the applicability of the antitrust laws to public contracts is of the utmost importance to governments and to those who do business with governments. It is a question that is bound to recur, now that it has been opened by the court below, unless this Court settles it at once.

II.

Relief cannot be had under the antitrust laws for injuries suffered as a result of valid governmental action; the inapplicability of the antitrust laws to public contracts is an aspect of that broad doctrine.[23]

The foundation cases are *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939), dealing with a federal program, and *Parker* v. *Brown*, 317 U.S. 341 (1943), dealing with a state program, in each of which it was held that a governmental program substituting for customary modes of competition a regime of cooperation among natural competitors could not be attacked for violation of the Sherman Act.

The doctrine of those cases remains unimpaired by any subsequent decision.[24] Certainly it remains true today that "the Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a

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[23] Examples of the application of this doctrine by the lower federal courts are Ladue Local Lines, Inc. v. Bi-State Developmental Agency, 433 F.2d 131 (8th Cir. 1970); Alabama Power Co. v. Alabama Electric Co-op., 394 F.2d 672 (5th Cir. 1968), *cert. denied*, 393 U.S. 1000 (1968).

[24] Continental Ore Co. v. Union Carbon Corp., 370 U.S. 690 (1962), casts no doubt upon the doctrine. There a private interested party was delegated power to act for the government of Canada and, by acting in restraint of the trade in which it was interested, abused the power in a manner not contemplated by any true government official. This Court held that the acts of the private agent could be considered in determining whether there was a conspiracy in violation of the Sherman Act. The behavior described in the *Continental Ore* opinion is a far cry from the usual governmental action case, including this case, in which there is no doubt that true government officials acted and—in this case at any rate—acted in accordance with the statute empowering them to act.

state." *Parker* v. *Brown, supra,* at 351. It is a matter not of exemption or immunity from the antitrust laws but of the limits of the coverage of those laws.[25] "[W]e do not reach any question of immunity, since there was no attempt on the part of Congress to impose liability in the first place." *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F.2d 52, 56 (1st Cir. 1966), *cert. denied,* 385 U.S. 947 (1966).[26]

In *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.,* 365 U.S. 127, 135-36 (1961), the court found it necessary to inquire into whether there was liability under the antitrust laws for private conduct that was intended to bring about governmental action by which injury was inflicted upon competitors. The Court held that private conduct to induce governmental action, even though joint and aimed at competitors and thus suspect under Section 1 of the Sherman Act, is also not actionable under the antitrust laws. That was a case in which railroads had engaged in efforts to

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[25] For this reason the court below is wide of the mark in its discussion of the cases in which this Court and the lower federal courts have considered whether particular private conduct is immunized from the antitrust laws by a federal regulatory statute or the action of a federal regulatory agency. (Pp. 32a-37a, *infra*). The issues in those cases relate to the presence or absence of express authority in the agency to confer antitrust immunity, the extent to which the agency is bound to consider the policies of the antitrust laws in making its decisions and the ability of the Department of Justice or private parties to attack private conduct said to be sanctioned by an agency order or a regulatory statute.

[26] The penalties of §§ 1, 2 and 3 of the Sherman Act are imposed on "every person" who violates their terms. Person as used elsewhere in the Act does not include the United States. United States v. Cooper Corp., 312 U.S. 600, 607 (1941); as to states, see Parker v. Brown, 317 U.S. 341, 351 (1943); Georgia v. Evans, 316 U.S. 159 (1942).

secure passage and enforcement of laws that would injure truckers. Later the same rule was applied in *United Mine Workers* v. *Pennington,* 381 U.S. 657 (1965), where there was an allegation of a conspiracy among mine owners and a union to induce the Secretary of Labor to establish certain standards that would prejudice smaller mine owners. The Court reiterated there that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition." *Id.* at 670.

Some recent decisions of the lower federal courts have sought to limit the doctrine of the *Noerr* and *Pennington* cases. See *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.,* 424 F.2d 25 (1st Cir. 1970), *cert. denied,* 400 U.S. 850 (1970); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America,* 438 F.2d 1286 (5th Cir. 1971), *petition for cert. filed* May 15, 1971 (No. 70-173, O.T. 1971); *Trucking Unlimited* v. *California Motor Transport Co.,* 432 F.2d 755 (9th Cir. 1970). This Court has accepted for review one of the cases in which a court of appeals has found potential antitrust liability in a campaign to induce governmental action. *California Motor Transport Co.* v. *Trucking Unlimited, cert. granted* June 1, 1970 (No. 70-92, O.T. 1971). There some trucking firms combined to oppose others' efforts to obtain from the Interstate Commerce Commission and the California Public Utilities Commission licenses to operate as truckers or enlargement of existing trucking licenses; the Ninth Circuit decided that the antitrust laws were applicable to the trucking firms' joint efforts.

If *Trucking Unlimited* is deserving of the Court's consideration, this case is even more so; it presents a

more basic question than *Trucking Unlimited.*[27] The fundamental lesson of *Parker* v. *Brown* and *United States* v. *Rock Royal Co-op.* is that the antitrust laws are inapplicable to valid governmental acts. The *Noerr-Pennington* doctrine is an offshoot of that principle, whose limits have constantly been in dispute.[28] The *Trucking Unlimited* case merely suggests new, narrower limits for the *Noerr-Pennington* doctrine. In this case, on the other hand, the very principle of inapplicability of the antitrust laws to governmental acts is brought into question.[29] Any review of issues relating to the status under the antitrust laws of governmental acts and related private conduct should include the issues raised by this case.

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[27] In addition, it should be noted that the court below relied upon *Trucking Unlimited* and, even more, on Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286 (5th Cir. 1971), which is pending in this Court on a petition for certiorari, No. 70-173. (Pp. 23a-25a, 31a-32a, *infra*).

[28] Costilo, *Antitrust's Newest Quagmire: The Noerr-Pennington Defense,* 66 Mich. L. Rev. 333 (1967); Walden, *More About Noerr —Lobbying, Antitrust and the Right to Petition,* 14 U.C.L.A. L. Rev. 1211 (1967); Comment, *Whitten* v. *Paddock: The Sherman Act and the "Government Action" Immunity Reconsidered,* 71 Colum. L. Rev. 140 (1971); Note, *Application of the Sherman Act to Attempts to Influence Government Action,* 81 Harv. L. Rev. 847 (1968).

[29] In George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25 (1st Cir. 1970), *cert. denied,* 400 U.S. 850 (1970), holding the antitrust laws applicable to the rigging of specifications for competitive bidding, the Court distinguished its earlier *Wiggins* decision involving the terms of a validly awarded public contract as lying "at the *Parker* [v. *Brown*] end of the spectrum" of governmental acts. *Id.* at 30.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1971

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2815-66

NORMAN F. HECHT, ET AL., *Plaintiffs,*

v.

PRO-FOOTBALL, INC., ET AL., *Defendants.*

OPINION

This action, as asserted by the plaintiffs in their second amended complaint, was brought against the defendants under § 4 of the Clayton Act (15 U.S.C. § 15), to recover treble damages and obtain injunctive relief because of alleged violations by the defendants of §§ 1, 2, and 3 of the Sherman Act (15 U.S.C. §§ 1, 2 and 3). Only the first three claims of plaintiffs' second amended complaint are pertinent to the matter before the Court. Those claims are set forth separately in what plaintiffs have denominated Counts 1, 2 and 3. The plaintiffs and some of the defendants have filed cross motions for partial summary judgments.[1]

The defendants joining in a motion for partial summary judgment are the National Football League, the District of Columbia Armory Board and its individual members, and Pro-Football, Inc., hereinafter referred to as "Redskins."[2]

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[1] Certain other defendants named in the second amended complaint were either served and thereafter dismissed or have not been served.

[2] Pro-Football, Inc. is a corporation which owns and operates in the District of Columbia a professional football team as a member of the National Football League. That team is known as the Washington Redskins.

Count 1 of the second amended complaint charges the defendants with entering into a contract in restraint of trade in violation of §§ 1 and 3 of the Sherman Act. Count 2 of the second amended complaint charges the defendant Redskins as being engaged in an attempt to monopolize the business of professional football in the District of Columbia in violation of §§ 2 and 3 of the Sherman Act. Count 3 of the second amended complaint charges the defendants Redskins and the National Football League of having been engaged and now being engaged in an unlawful conspiracy to restrain and monopolize, and of engaging in an attempt to monopolize, and of having monopolized, the business of professional football in the District of Columbia in violation of §§ 1, 2 and 3 of the Sherman Act.

Essentially the charges made by plaintiffs in Counts 1, 2 and 3 of the second amended complaint arise out of a lease agreement made on December 24, 1959, between the District of Columbia Armory Board and the Redskins and particularly paragraph II(e) of that agreement. By that instrument the Armory Board leased to the Redskins for a period of 30 years, beginning with the football season of 1961 and terminating at the conclusion of the football season of 1990, the now named Robert F. Kennedy Stadium for the purpose of exhibiting all Redskins home professional football games. The lease provided that at no time during its term would the stadium be let or rented to any professional football team other than the Redskins. Plaintiffs assert that that restrictive covenant constituted a contract in unreasonable restraint of the business of professional football in the District of Columbia; that it granted the Redskins a monopoly of the business of professional football in the District of Columbia. And plaintiffs further assert that the restrictive covenant resulted from an unlawful combination and conspiracy being engaged in by the Redskins and the National Football League to restrain and monopolize professional football in the District of Columbia.

The undisputed facts disclose that the Redskins is a professional football team and the only football team which engages in the exhibiting of professional football games in the District of Columbia. The National Football League is an unincorporated association of professional football teams located in several cities in the United States. The Redskins is a member of the National Football League and it plays football games with other teams which are members of the National Football League. The schedules of such games are made up by the National Football League and certain services, such as game officials, are made available to the participating teams by the National Football League. The Redskins have been engaged in exhibiting professional football in the District of Columbia for a period of more than 25 years.

Plaintiffs Hecht, Kagan and Miller describe themselves as joint venturers who desire to participate in the ownership of a professional football team that would play its games in the District of Columbia. They assert that because of the restrictive covenant in the Redskins lease with the Armory Board they were unable to organize an American Football League team and a Continental Football League team in the District of Columbia. Plaintiff Washington Federals, Inc. is a corporation created for the purpose of organizing and operating in the District of Columbia a professional football team. Plaintiffs Hecht, Kagan and Miller own all of the stock of the Washington Federals, Inc. Plaintiff United States Football League, Inc. is a non-profit corporation which Hecht, Kagan and Miller helped to form. The Washington Federals, Inc. is allegedly a member of the United States Football League, Inc. Neither the Federals nor any other franchise holder in that League has ever employed coaches and players let alone fielded a team or played a game.

The American Football League, at the time plaintiffs, Hecht, Kagan and Miller announced they were interested in organizing a Washington team in that league, was a

separate and competing league from and with the National Football League. Since the institution of this action in 1966, the National Football League and American Football League have merged. That merger and its effects are not relevant to the claims asserted in the Counts 1, 2 and 3 of the second amended complaint.

The Continental Football League has been described by Hecht as a minor football League.

Hecht, Kagan and Miller have never owned nor been associated with an organization which owned and operated a professional football team. Nor have they had any experience with professional football. Hecht is the manager and assistant cashier of a branch bank; Kagan is part owner and operator of a retail liquor store; Miller operates a restaurant. At the time of oral argument counsel for the plaintiffs conceded that, other than as promoters who are attempting to organize a professional football team, plaintiffs Hecht, Kagan and Miller had no business or property that could in any way be injured by the alleged violations of the antitrust laws.

Plaintiffs argue that the restrictive covenant in the Redskins' lease is on its face a contract in restraint of trade and commerce. Defendants respond by asserting that the lease being a contract of the Armory Board, a governmental agency, is not within the scope of the Federal antitrust laws.

In *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority, et al.*, 362 F.2d 52 (1 Cir., 1966), *cert. denied*, 385 U.S. 947 (1966), plaintiff Wiggins sought to recover treble damages and obtain equitable relief on its claim that defendants Port Authority and two corporations had entered into a conspiracy, combination or contract in restraint of trade or commerce in that they attempted to establish a sole and exclusive fixed base operation at Logan Airport in Boston, Massachusetts, and that each of the defendants attempted to monopolize and combined or conspired to monopolize the fixed base operation business, all allegedly

in violation of §§ 1 and 2 of the Sherman Act.[3] The contract with the Port Authority gave the defendant corporations the exclusive right to the fixed base operation at Logan Airport. For some years prior to that contract Wiggins and another company conducted fixed base operations as competitors at Logan Airport. Both Wiggins and the competing company, as a result of the Port Authority's contract with the defendant corporations, were no longer permitted to do a fixed base operation business at Logan Airport. The United States District Court for the District of Massachusetts entered a judgment dismissing the action on the ground that the complaint did not state a claim upon which relief could be granted. The Court of Appeals, in affirming the District Court, stated, 362 F.2d at 55:

> In carrying out its responsibilities the Authority decided that it was necessary to have only one fixed base operation at Logan and pursuant to that decision, entered into the lease with Butler-Boston. It is clear that in doing so it was acting as an instrumentality or agency of the state, pursuant to the legislative mandate imposed upon it to operate and manage the airport and establish rules and regulations for its use. Plaintiff's contention that the Authority in operating Logan Airport is engaged in a purely proprietary capacity and is conducting a private business has no merit. Nor does the arrangement with Butler-Boston violate the Sherman Act. What was done here was in the exercise of a valid governmental function. The antitrust laws are aimed at *private* action, not at governmental action.

The court having found that the Port Authority's conduct was lawful further held that it would be "unreason-

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[3] "A fixed base operation is one that provides facilities, fuel, equipment, supplies and services at an airport which are used by aircraft, crews, passengers and in handling freight connected therewith. It is vital to air transportation." 362 F.2d 53, n. 2.

able restriction on its freedom to hold that the other defendants acted illegally in having aided it" in the performance of a governmental function. 362 F.2d 56.

In *Sun Valley Disposal Co., Inc.* v. *Silver State Disposal Co., et al.*, —— F.2d ——, (9 Cir., December 17, 1969), a summary judgment for defendants was affirmed. There plaintiff had operated a garbage pick up and disposal service in Clark County, Nevada. In engaging in that business it had been competing with one of the defendants until the latter obtained an exclusive franchise from the Clark County Commission, a governmental body. In holding that the exclusive garbage collection and disposal service contract was not illegal the Ninth Circuit cited *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority, supra*, as holding that "valid municipal action is without the scope of the federal antitrust laws."

The *Wiggins* and *Sun Valley* decisions are consistent with the rulings of the Supreme Court and other courts that valid governmental action is not subject to the Federal antitrust laws. *Eastern R. Conf.* v. *Noerr Motors*, 365 U.S. 127 (1961), *Mine Workers* v. *Pennington*, 381 U.S. 657 (1965), *Parker* v. *Brown*, 317 U.S. 341 (1943), *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.*, 394 F.2d 672 (5 Cir., 1968), rehearing denied, 397 F.2d 809 (1968), *Woods Exploration & Producing Co., Inc.* v. *Aluminum Company of America*, 284 F. Supp. 582 (S.D. Texas, 1968).

The plaintiffs would distinguish *Wiggins* and *Sun Valley Disposal Co.* by asserting that the agreements in those cases were the result of governmental action while the leasing of the stadium by the Armory Board to the Redskins was in the nature of a business or proprietary act on the part of the Board. Plaintiffs cite *District of Columbia* v. *Green*, 96 U.S.App.D.C. 20, 223 F.2d 312 (1955), as an authority in support of their contention. But that case had to do with the question of governmental immunity from an action for negligence and not with the matter of

immunity from the application of the antitrust laws. The history of immunity or want of immunity in tort actions with respect to municipal corporations is to say the least inconsistent and imprecise. It deals with the difference between discretionary and ministerial acts by municipal corporations as well as efforts to distinguish governmental functions exercised solely for the public at large from those for the private benefit of the municipality. Thus it has been held that fire prevention, police and education are governmental functions while activities related to *municipal railways, airports, gas, water and light systems* are proprietary. But there has been no consistency in the decisions of the courts. 54 Harv. L. Rev. 437, 442, 34 Yale L.J. 129, 22 Va. L. Rev. 910, 914-917, *Hesse* v. *Rath, et al.*, 249 N.Y. 435, 164 N.E. 342 (1928), *Scibilia* v. *City of Philadelphia*, 279 Pa. 549, 124 A. 273 (1924), *City of Cleveland* v. *Ruple*, 130 Ohio St. 465, 200 N.E. 507 (1936).

Nor does *District of Columbia* v. *Green, supra*, any longer have its original vitality. Its ruling was undercut in *Elgin* v. *District of Columbia*, 119 U.S.App.D.C. 116, 337 F.2d 152 (1964). Moreover, in the recent case of *Spencer* v. *General Hospital of the District of Columbia*, —— U.S. App.D.C. ——, —— F.2d —— (November 10, 1969), the Court of Appeals sitting *en banc* provided "a formal interment of the 'governmental-proprietary' test of immunity."

In applying the "one man one vote" principle, the Supreme Court has considered the building and running of hospitals and the establishing of a housing authority as carrying out governmental functions. *Avery* v. *Midland County*, 390 U.S. 474, 476-477 (1968).

In *City of Cleveland* v. *Ruple*, 130 Ohio St. 465, 200 N.E. 507, the Cleveland municipal stadium and the related city owned structures, including public halls and a parking garage, were held to have been constructed and leased for public purposes. That such purposes attach to the stadium here is evident from a review of the District of Columbia Stadium Act.

The Robert F. Kennedy Stadium was constructed pursuant to an Act of Congress originally enacted in 1957 and subsequently amended in 1958 and again in 1959. § 2-1720 D. C. Code (1967). That statute expressly authorized the Armory Board to construct, maintain and operate the stadium "[i]n order to provide the people of the District of Columbia with a stadium suitable for holding athletic events and other activities and events of a nature requiring such a facility." In order to accomplish that purpose the Secretary of the Interior was authorized to acquire "by gift, purchase, condemnation or otherwise" certain described property and to enter into a contract with the Armory Board for the construction, maintenance and operation of the stadium which contract was to be for a term not exceeding thirty years. § 2-1721 D.C. Code (1967). The Armory Board, in order to carry out the purposes of the Act, was authorized among other things to determine all questions concerning the use of the stadium for the purposes of the Act, to operate or contract for the operation of concessions deemed appropriate for the purpose for which the stadium might be rented or leased, to furnish services to lessees as in the judgment of the Armory Board were necessary or suitable for carrying out the purposes of the Act, and to lease the stadium for any of the purposes of the Act at such rental values and for such periods of time as the Board should determine. It was pursuant to the authority thus vested in the Board that the lease complained of by the plaintiffs was entered into by the Redskins. § 2-1723 D.C. Code (1967).

That lease was executed on December 24, 1959, for a term of thirty years, which term was to commence with the football season of 1961, and to terminate at the conclusion of the football season of 1990. As the legislative history of the District of Columbia Stadium Act reveals, there would have been no stadium unless a long-term lease could be negotiated by the Armory Board with the Redskins. When the legislation was under consideration by the committees

of Congress the then Chairman of the Armory Board asserted that without a long-term Redskin lease the stadium could not be constructed.[4]

The fact that there is a thirty year lease with the Redskins is significant for two reasons. First, the Stadium Act provides that the Secretary of the Interior's contract with the Armory Board for the construction, maintenance and operation of the stadium was to be for a term of not more than thirty years. Thus that contract and the Redskins' lease are for approximately the same thirty years. Second, Congress authorized the Armory Board to provide for the payment of the construction, operation and maintenance of the stadium through the issuance of bonds with the principal payable not later than thirty years from the date of issuance.[5]

Thus, the Armory Board was not only authorized to provide the people of the District of Columbia with a suitable stadium but it was obligated to provide for the payment of the construction, operation and maintenance of the stadium through a bond issue. The sinking fund for the payment of the bonds' principal and interest is to be derived from the receipts resulting from the exercise of the Board of its statutory powers, including the leasing of the stadium. Faced with the obligations imposed by the Act and aware that a long-term lease with the Redskins was necessary if those obligations were to be met and the purposes of the Act accomplished, the Armory Board entered into the complained of lease agreement. Thus, the leasing of the

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[4] Transcript of Hearings on S. 3736 and H.R. 12162 before the Subcommittee on the Judiciary of the House Committee on the District of Columbia and the Subcommittee on Fiscal Affairs of the Senate Committee on the District of Columbia, 85th Cong., 2d Sess. (p. 88).

[5] In the event refunding bonds were issued they would mature no later than thirty years from their issuance, or fifty years from September 7, 1957, whichever occurred first.

stadium was pursuant to the mandate of the Act and was governmental action. As such it was as much exempt from the antitrust laws as was the exclusive agreement entered into by the Massachusetts Port Authority in its exclusive lease to the Butler-Boston Company and the exclusive franchise contract between the Clark County Commission and Clark Sanitation, Inc.

Since the Armory Board's conduct was lawful the Redskins did not act illegally in entering into the lease.[6] To conclude otherwise "would be an unreasonable restriction" on the Board's freedom. *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F.2d 52, 56, *cert. denied,* 385 U.S. 947 (1966), *Alabama Power Co.* v. *Alabama Electric Cooperative, Inc.,* 394 F.2d 672, 677, rehearing denied, 397 F.2d 809 (1968). No violation of the Act can be made out even where there is a restraint upon trade or monopolization if it resulted from valid governmental action. *Eastern R. Conf.* v. *Noerr Motors,* 365 U.S. 127, 136 (1961).

Notice has been taken of the other contentions of the parties. Some are inappropriate for consideration on motions for summary judgment; others are without merit.

The motion of defendants Armory Board, Pro-Football, Inc. (Redskins) and the National Football League for summary judgment on Counts 1, 2 and 3 of the second amended complaint is granted.

The motions of plaintiffs on Counts 1, 2 and 3 of the second amended complaint are denied.

WILLIAM B. JONES
Judge

April 16, 1970

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[6] The National Football League contends it had nothing to do with stadium lease. But assuming it had, it, like the Redskins, would not have been acting illegally.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,446

NORMAN F. HECHT,
HARRY KAGAN,
MARC A. MILLER, APPELLANTS
WASHINGTON FEDERALS INC., ET AL.

v.

PRO-FOOTBALL, INC., ET AL.

Appeal from the United States District Court
for the District of Columbia

Decided April 27, 1971

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Before WILKEY, *Circuit Judge*, VAN PELT,* *Senior United States District Judge* for the District of Nebraska, and GIGNOUX,** *United States District Judge* for the District of Maine.

WILKEY, *Circuit Judge*: Appellants brought this action under §§ 1, 2, and 3 of the Sherman Act, alleging that a restrictive covenant in the lease between appellee Pro-Football, Inc., and appellee District of Columbia Armory Board, which prohibits the use of Robert F. Kennedy Stadium by any professional football team other than the Washington Redskins for a period of thirty years, violates the prohibition against contracts in restraint of trade.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d) (1964).

** Sitting by designation pursuant to 28 U.S.C. § 292(c) (1964).

Appellant-plaintiffs are three local businessmen, who over a period of time sought to obtain either an American or Continental Football League franchise for Washington, D.C. The appellee-defendants are Pro-Football, Inc., the corporate name of the Washington Redskins, the National Football League, an unincorporated association of owners of professional football teams of which appellee Pro-Football, Inc., is a member, and the District of Columbia Armory Board, an unincorporated instrumentality of the District of Columbia which operates Robert F. Kennedy stadium.

Count 1 of appellants' complaint alleges that the restrictive covenant in the Redskins' lease on Kennedy Stadium constitutes a contract in restraint of the business of professional football in the District of Columbia, thus violating §§ 1 and 3 of the Sherman Act. Count 2 alleges that the Redskins are engaged in an attempt to monopolize and have monopolized the business of professional football in violation of §§ 2 and 3. Count 3 joins the National Football League and two individuals not parties to this appeal with the Redskins in an alleged unlawful combination and conspiracy to restrain and monopolize the business of professional football in violation of §§ 1, 2, and 3 of the Sherman Act.

On cross-motions for summary judgment, the U.S. District Judge granted the appellee-defendants' motions for summary judgment on all three counts, reasoning:

> Thus, the leasing of the stadium was pursuant to the mandate of the Act and was governmental action. As such it was . . . exempt from the antitrust laws. . . . No violation of the Act can be made out even where there is a restraint upon trade or monopolization if it resulted from valid governmental action. *Eastern R. Conf.* v. *Noerr Motors*, 365 U.S. 127, 136 (1961).

In the manner the cross-motions for summary judgment were submitted to the District Court, this was the only

issue before it. The District Judge did not purport to decide, and indicated that before doing so he would need to hear evidence, whether the restrictive covenant in the lease *does* constitute a contract in restraint of the business of professional football, or whether this restrictive covenant effectuates any monopoly of professional football by the Redskins, or whether the restrictive covenant furthers the conspiracy to restrain and monopolize the business of professional football as alleged.

Nor do we decide these issues on this appeal. For reasons set forth below, we conclude that the District Judge erred in his holding recited above, and that the cause must be remanded for trial upon the issues left undecided by the grant of appellee-defendants' motion for summary judgment.

I. *The Statute and the Lease*

The Robert F. Kennedy Stadium was constructed pursuant to an Act of Congress of 1957, with amendments in 1958 and 1959.[1] By this statute the Armory Board was authorized to construct, maintain and operate the stadium "in order to provide the people of the District of Columbia with a stadium suitable for holding athletic events and other activities and events of a nature requiring such a facility."[2] The Secretary of the Interior was authorized to acquire "by gift, purchase, condemnation, or otherwise," the property and to contract with the Armory Board for the construction, maintenance and operation of the stadium for a term not exceeding thirty years.[3] Another section of the statute, strongly relied upon by the appellees here, provided:

> In order to carry out the purposes of this subchapter, the Board is hereby authorized *without regard to any*

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[1] 2 D.C. Code § 1720 *et seq.*

[2] 2 D.C. Code § 1720.

[3] 2 D.C. Code § 1721.

> *other provision of law,* but subject to any contract entered into with the Secretary of the Interior under section 2-1721 [for the use of the Stadium site]—
>
> (1) *to determine all questions concerning the use of the stadium* for the purposes of this subchapter;
>
> * * * *
>
> (8) *to rent or lease* from time to time for any of the purposes of this sub-chapter, *all or any part or parts of the stadium* including any or all structures, equipment or facilities of the stadium, at such rental values and for *such periods of time as the Board shall determine; . . .*[4] (Emphasis supplied by appellees in brief.)

Pursuant to this statute the stadium was constructed and the lease between the Armory Board and the Redskins entered into 24 December 1959 for a term of thirty years, commencing with the football season in 1961. There is no contention made here that there was any fraud, misrepresentation, or overreaching on either side. There was arm's-length, hard bargaining between the two parties for approximately a year and a half before the lease agreement was signed. The restrictive covenant complained of reads:

> [T]he Lessor shall have the right to lease or otherwise permit the use and occupancy of the Stadium during any period exclusive of such specific dates referred to herein for any purpose or purposes, (except provided in subsection (a) of this Paragraph IX), including (but not limited to) school, college or other amateur or professional baseball, football and basketball games and, also, for such other use or purpose as the Lessor may determine, *provided that at no time during the term of this Lease Agreement shall the Stadium be let or rented to any professional football team other than the Washington Redskins.* (Emphasis supplied.)

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[4] 2 D.C. Code § 1723.

It is alleged and not contradicted that Kennedy Stadium is in fact the only suitable place for professional football in the District of Columbia. It is undisputed that it has many unique advantages. In 1965, appellants on behalf of themselves and others with a financial interest in their venture submitted an offer to the Armory Board to lease Kennedy Stadium on those Sundays, Friday nights, and Saturdays, and other times the stadium was not being used by the Redskins, for a minimum guaranteed rent or the same percentage of the gross receipts paid by the Redskins. The Armory Board replied that under the terms of the lease with the Redskins it was prohibited from leasing the stadium to them or to anyone for the use of another professional football team. After reiterations of the offer, the Armory Board continued to adhere to its position that the restrictive covenant of the lease prohibited it from leasing Kennedy Stadium to another football team without the consent of the Redskins.[5] Thus, appellants were not able to secure the use of the stadium at any time during the year for professional football purposes, and they allege that for this reason their efforts to obtain franchises in the two professional football leagues fell through.

The District Court emphasized in its opinion that the legislative history of the Stadium Act shows that "there would have been no stadium unless a long-term lease could be negotiated by the Armory Board with the Redskins." The District Court also placed great emphasis on the fact that the Secretary of Interior's contract with the Armory Board for the construction, maintenance, and operation of the stadium was for a term of not more than thirty

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[5] On 7 October 1965 the Special Assistant to the Solicitor of the Department of Interior furnished the Solicitor's legal opinion to the Armory Board, concluding that the restrictive covenant in the lease was in violation of the antitrust laws. On the basis of a contrary opinion from a private law firm, however, the Board adhered to its position that the lease's restrictive clause was binding and enforceable.

years, and that Congress authorized the Armory Board to issue bonds for the construction of the st. ium with the principal payable not later than thirty years from the date of issuance.

In the District Court's opinion all of this added up to governmental action which created an immunity from the normal application of the antitrust laws. We can agree that most of this was governmental action, that governmental action was sensibly intermeshed and coordinated over the same time span, and that there might have been no stadium unless there could have been a long-term lease with the Redskins professional football team (as well as the Washington professional baseball team), but there is no finding by the District Court that there would have been no lease with the Redskins without the restrictive covenant complained of and that Congress knew this, nor is there any finding that Congress directly authorized such a restrictive covenant.

II. *The Applicability of the United States Antitrust Laws to "Valid Governmental Action"*

The rationale of the trial court and the theory of the appellees in sustaining its decision is set forth as "the execution of the . . . lease . . . constituted valid governmental action which is immune from application of the antitrust laws." In support of this appellees state, "The key, undisputed fact is that the Armory Board is a governmental agency." And we are cautioned not to "overlook the fact that, in leasing the Stadium, the Armory Board acted pursuant to an Act of Congress." In conclusion, after review of the pertinent authorities, appellees deduce the "rule that where direct governmental action, as distinct from private conduct, has caused the alleged injury to a plaintiff, the provisions of the federal antitrust laws are inapplicable, . . ." and "the action of the Armory Board in entering into the Stadium lease with the Redskins was a governmental act which is immune from application of the antitrust laws."

After a study of the rationale back of the decided cases in this area of antitrust law, we consider that the issue, the facts considered most relevant by appellees, and the rule derived by appellees is a much too talismanic approach where scrupulous distinctions are called for. As was said earlier this year by Judge Goldberg in *Woods Exploration & Producing Co., Inc.* v. *Aluminum Co. of America*, "[t]he instant case involve[s] state participation. That proposition, however, only begins the analysis, for it is not every governmental act that points a path to an antitrust shelter. We reject 'the facile conclusion that action by any public official automatically confers exemption.' *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, . . . 1 Cir. 1970, 424 F.2d 25, 30."[6] Like Circuit

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[6] [1971 Trade Cases ¶ 73,422], Nos. 28,763, 29,487 (5th Cir., 5 Jan. 1971). Though *Woods* never referred to *Alabama Power Co.* v. *Alabama Electric Cooperative*, 394 F.2d 672 (5th Cir. 1968), it is obvious that its rationale, based as it is on the proposition that "not every governmental act . . . points a path to an antitrust shelter," represents a significant shift in the Fifth Circuit away from the views of the majority in *Alabama Power*, which was based upon the flat assertion that "it is settled that neither the Sherman Act nor the Clayton Act was intended to authorize restraint of governmental action," *id.*, at 675, towards the rationale of Judge Godbold's dissent in that case. In language expressive of the approach we take here, Judge Godbold stated:

> Congress can, and in numerous instances by express legislation has, subordinated the national policies reflected in the antitrust laws so as to authorize government officials to perform acts or pursue policies without regard to the antitrust laws. . . . The courts carefully have limited these expressly conferred immunities to the scope defined in each instance by Congress so as to avoid pro tanto repeal of the antitrust laws. *Id.*, at 680.

And,

> The cases do not support a proposition of general governmental immunity. If there is such a principle Congress has been proceeding for a long time under a misapprehension in providing for government officers, and those with whom they deal, exemptions which are specific in nature and varying in scope. *Id.*, at 685.

Judge Coffin in *Paddock Pool, supra*, "[w]e are particularly reluctant to rely on verbal formulae to solve problems of antitrust liability."[7]

Although the Sherman Act has been characterized as "a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade,"[8] it is fundamental that neither the Sherman Act nor any other antitrust statute restricts the United States Government in directing action in complete contradiction to antitrust policy, because after all the Sherman Act and related antitrust statutes are only statutes, not constitutional charters. But, the basic philosophy of our antitrust policy has been so long established, is of such recognized economic importance, and has assumed in the statutory scheme of things such high dignity[9] that a contrary congressional intent or "immunity from antitrust laws 'is not lightly implied.'"[10]

Anticipating a bit our conclusions below, we suggest that it may be inaccurate and confusing to speak of "valid governmental action which is immune from application of the antitrust laws." Rather, the proper inquiry would seem to be to what extent Congress has knowingly adopted a policy contrary to or inconsistent with the previously established antitrust laws, or, where state action is concerned (since states are not named in the Sherman Act and antitrust laws are directed at suppression of anticompetitive business action), the inquiry should be to what extent is the state action permissible as not con-

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[7] 424 F.2d 25, 29 (1st Cir. 1970).

[8] *Northern Pacific Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958).

[9] *See, e.g., United States* v. *Philadelphia National Bank*, 374 U.S. 321, 348 (1963), stressing "the indispensable role of antitrust policy in the maintenance of a free economy."

[10] *United States* v. *First City National Bank*, 386 U.S. 361, 368 (1967), quoting *California* v. *F.P.C.*, 369 U.S. 482, 485, (1962).

travening the federal antitrust laws, which in our federal system constitute overriding legislation under the federal commerce power.

Putting the problem in this light, relevant criteria would include the specific language of the congressional statute involved, any legislative history which would throw light on the congressional intent, the relative importance of the governmental action which is asserted to override antitrust policy, whether the governmental agency is required to take into consideration the possible anti-competitive effect of its actions, whether the agency is required to adhere to a clearly defined and restricted statutory directive, and to what extent the agency's actions are subject to judicial review.

We now turn to examine previous cases in which so-called governmental action immunity has been an issue, the answers given therein, and the principles which emerge therefrom.

A. *State regulation of business.*

Although it might be more logical to consider first the Federal Government's regulation of business, yet the cases relied upon most strongly by both parties involved state action raising questions under the federal antitrust laws, and since the Armory Board here is somewhat similar to a state governmental agency, we turn first to the state regulation cases.

The oldest called to our attention is *Olsen* v. *Smith*,[11] in which Texas harbor pilots, licensed by the State of Texas, sued to enjoin the activities of non-licensed pilots. The defendants challenged the state licensing system as being invalid under the federal antitrust laws, an argument which the Supreme Court rejected:

> [I]f the State has the power to regulate, and in so doing to appoint and commission, those who are to

[11] 195 U.S. 332 (1904).

perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the State are alone allowed to perform the duties devolving upon them by law.[12]

Parker v. *Brown*[13] is apparently the decision which opened the eyes of the antitrust bar to the possibilities of avoiding the impact of the antitrust laws, if only state governmental action is in some way involved. In *Parker* the State of California, at the petition of some raisin growers, established market and price controls over California raisins, an action which necessarily had considerable impact on competition, since California produces most of the raisins consumed in the United States. The Supreme Court validated this marketing program, adopted pursuant to the California Agricultural Prorate Act, holding that the Sherman Act prohibits private action which has an anticompetitive effect, but does not apply to state action. The Court "found the California regulation consistent with the national policy embodied in the Agricultural Adjustment Act, which authorized the Secretary of Agriculture to impose similar marketing restrictions and which recognized the simultaneous coexistence of state regulation in its general instructions to the Secretary of Agriculture to harmonize state and federal regulation."[14]

Since the Court found the state regulation harmonious with the federal agricultural regulatory scheme, the Supreme Court could safely find that Congress had no intent to have the already existing antitrust laws forbid this type of state action, *i.e.*, state agricultural regulation. The Congress had already enacted a federal Agricultural Adjustment Act which was inconsistent with the application

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[12] *Id.*, at 345.

[13] 317 U.S. 341 (1943).

[14] P. Areeda, Antitrust Analysis 57 (1967).

of the previously existing federal antitrust laws in this area, the congressional agricultural statute was of equal dignity with the antitrust statute, and the state agricultural action was harmonious with the federal regulation; hence, the Supreme Court did not apply the prohibitions of the antitrust laws to this type state regulatory action.

In so doing, however, the Supreme Court did not give much emphasis to a comparative evaluation of the other important national policy, and used broad language which was to provide the foundation for a much more expansive governmental action immunity doctrine to be developed by other courts in later cases:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. . . . [A]n unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.[15]

The Court also pointed out:

> The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly, but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.[16]

Thus, *Parker* v. *Brown* involves not just state governmental action; it involves regulatory action in the state's capacity as sovereign, and it involves sovereign state regulatory action which is consistent with federal national policy, *i.e.*, the Agricultural Adjustment Act, enunciated

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[15] 317 U.S., at 350-51.

[16] 317 U.S., at 352.

by the national Congress, which is also the source of federal antitrust policy.[17]

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[17] Years later the Fourth Circuit explained some of the limitations inherent in *Parker* v. *Brown:*

> The teaching of *Parker* v. *Brown* is that the antitrust laws are directed against individual and not state action. When a state has a public policy against free competition in an industry important to it, the state may regulate that industry in order to control or, in a proper case, to eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials. . . . (Citing cases.) . . . . But such action must be state action, not individual action masquerading as state action. A state can neither authorize individuals to perform acts which violate the antitrust laws nor declare that such action is lawful. *Asheville Tobacco Board of Trade, Inc.* v. *F.T.C.* (4th Cir. 1959), 263 F.2d 502, 509. *Cf.* the most recent Fourth Circuit decision following *Parker, Washington Gas Light Co.* v. *Virginia Electric and Power Co.*, — F.2d —, 39 U.S.L.W. 2453-54, (4th Cir. 12 Feb. 1971).

See also the recent decision of the Fifth Circuit in *Gas Light Co. of Columbus* v. *Georgia Power Co.*, — F.2d —, — 39 L.W. 2545, 2546 (5th Cir., 23 March 1971), where in considering the antitrust implications of the adoption by the Georgia Public Service Commission, regulating industry of undeniable importance to the state, the court said:

> Each of these acts and practices are (sic) rate schedules and each has been considered by the Georgia Public Service Commission in an adversary proceeding. Each is effective by order of the commission. . . . Defendant's conduct cannot be characterized as individual action when we consider the state's intimate involvement with the rate-making process. Though the rates and practices originated with the regulated utility, Georgia Power, the facts make it plain that they emerged from the commission as the products of the commission. They are thus immune from the operation of the antitrust laws under the Parker exemption.

The result reached differs from that by the same Circuit in *Woods,* but is justified by the fact that, although a state regula-

The valid rationale of *Parker* v. *Brown* was recently extensively analyzed by the Fifth Circuit in *Woods Exploration & Producing Co., Inc., et al.* v. *Aluminum Company of America, et al.*[18] There two large-tract natural gas operators allegedly conspired to file false forecasts with the Railroad Commission of Texas, which regulates the allowable amount of gas to be produced from each well or unitized tract. These forecasts were used by the Railroad Commission to calculate the production allowable, and thus had a direct influence on the nature of the state regulatory action taken, particularly an adverse influence on the amount of production allowed small-tract natural gas operators, who filed the antitrust suit. The defendants relied upon *Parker* v. *Brown, supra, Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*,[19] and *United Mine Workers* v. *Pennington*.[20] The Fifth Circuit reversed the District Court's grant of summary judgment to the defendants, holding that the Woods case was similar to *Continental Ore Company* v. *Union Carbide and Carbon Corporation*,[21] where the Supreme Court held that defendants' anticompetitive activities were not protected

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tory agency is involved in each instance, in *Woods* the action of the agency was alleged to be influenced by the *illegal agreement* among the private parties to furnish *false data*, while no such circumstance was alleged in *Gas Light*. However, the approach of Judge Bell in *Gas Light* gave more weight to the sheer existence of state action than did the attempt to reconcile antitrust and regulatory policies of Judge Goldberg in *Woods* or Judge Godbold dissenting in *Alabama Power*, perhaps because such comparative analysis was simply not called for on the facts of *Gas Light*.

[18] *Supra*, note 6.

[19] 365 U.S. 127 (1961).

[20] 381 U.S. 657 (1965).

[21] 370 U.S. 690 (1962).

under the *Parker* rationale.[22] Judge Goldberg's carefully reasoned opinion also rejected the rationale "that because of extensive regulation the oil and gas industry is not susceptible to the strictures of the antitrust laws." Rather, he considered that "state regulation does not mean that there is no room for antitrust policies to operate. . . . We therefore think it incumbent upon this court to render both state regulatory and federal antitrust goals complementary rather than mutually exclusive."[23]

In *Woods* the Fifth Circuit took the approach of trying to reconcile the overall antitrust policy with the highly important state policy of regulating gas output. Where state regulatory action is concerned, this is a logical approach. But this reconciliation of state and federal goals is but a part of the overall problem, is only one example of several areas where the overall question is to what extent, if any, the Congress intended to permit action not consistent with the antitrust laws. In the case at bar we do not put the matter as an effort to make state and federal goals complementary rather than exclusive. Since Congress enacted both the antitrust laws and the

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[22] The *Woods* opinion describes *Continental Ore* thusly:

There, a private firm acting as administrator of Canada's wartime rationing program used its discretionary power to exclude a competing processor of vanadium ore from the Canadian market. In defense of a private treble damage action, defendants asserted that the purchasing agent was acting as an administrator of the Canadian Government and that the conduct was therefore privileged under *Parker*. The Supreme Court, stressing that there was no evidence that the Canadian Government had approved of the conduct of its agent, held that such conduct was subject to the Sherman Act. Again, in *UMW* v. *Pennington* . . . the Court reiterated this rationale and distinguished *Continental Ore* on the ground that in that case there had been no indication that any Canadian official "would have approved of joint efforts to monopolize the production and sale of vanadium. . . ."

[23] *Supra*, note 6, slip op. at 8.

District of Columbia statute authorizing the construction of the stadium, the proper inquiry is to what extent, if any, Congress intended the action of the Armory Board not to be subject to the previously existing national antitrust policy. The appellees contend, and the trial court seemed to go on this theory, that where there can be established unequivocal state action the antitrust laws do not apply. We might paraphrase Judge Goldberg, "But this state [action] does not mean that there is no room for antitrust policies to operate."[24]

B. *State-created sole intrumentalities.*

In contrast with the technique of regulating a field of business with resulting undeniable anticompetitive effects, in some instances the state has either created or contracted with a corporate entity, which became the state's sole instrumentality in carrying out what clearly would otherwise be a governmental function.

In *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*,[25] "[t]he Authority decided that it was necessary to have only one fixed base operation at Logan [Airport] and pursuant to that decision, entered into the lease with Butler-Boston. It is clear that in doing so it was acting as an instrumentality or agency of the state pursuant to the legislative mandate imposed upon it to operate and manage the airport and establish rules and regulations for its use." The action of the Authority in entering into the exclusive lease with Butler-Boston for the base operation at Logan Airport necessarily had an anticompetitive effect upon all other private corporations, including the plaintiff Wiggins Airways, who might have been involved in, or who might have desired to enter into, all or part of the activities constituting the operation of the base at Logan Airport. Wiggins sued under §§ 1 and

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[24] *Id.*

[25] 362 F.2d 52, 55 (1st Cir. 1966).

2 of the Sherman Act, alleging the exclusive lease contract was violative of these sections. Here obviously was a situation in which the state itself might have performed the very functions that it delegated to Butler-Boston as its exclusive instrumentality; hence, the First Circuit rejected the plaintiff's contention that the state action was violative of the federal antitrust laws.

A similar rationale lies behind the decision in *Ladue Local Lines, Inc.* v. *The Bi-State Developmental Agency of the Missouri-Illinois Metropolitan District.*[26] There Ladue, a private corporation engaged in bus transport in the metropolitan St. Louis area, alleged violation of § 2 of the Sherman Act in the organization of Bi-State through legislative action by Missouri and Illinois, and the subsequent action of Bi-State in the transportation of school children in the metropolitan area of St. Louis. The Eighth Circuit held:

> The fact that the effect of the compact gives Bi-State a monopoly and that competitive interests of private concerns are harmed does not violate the Sherman Act. We deem it well settled that when a state announces a public policy against free competition in an industry essential to it, state control and regulation of that industry, even to the extent of eliminating competition, is permissible.[27]

Here again the operation of a municipal bus line is something which the state or its creature, a municipality, might do for itself. Since an area in two states was involved, the legislatures of two states, with the approval of the United States Congress, created a bi-state authority to perform a strictly governmental function which, if performed by government, would certainly constitute a monopoly. The

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[26] 433 F.2d 131 (8th Cir. 1970).

[27] *Id.*, at 137.

fact that the two states chose to create a separate public service non-profit corporation to serve as the sole instrumentality does not run afoul of the federal antitrust laws.

We suggest the obvious distinction of *Wiggins Airways* and *Ladue Local Lines* from the case at bar is that when Congress empowered the Armory Board to construct, maintain, and operate Kennedy Stadium, it was empowering the Armory Board to do what another governmental agency, such as the Interior Department, which does own the land and the stadium itself, could have done as straight-forward federal governmental action, *i.e.*, operate the stadium with full authority to rent to exhibitors of football games. On the rationale of *Ladue* and *Wiggins* such governmental agency action would not be subject to antitrust challenge, nor is the Board's management of the stadium *per se* challenged. But what Congress did not do is create the Board as an instrumentality to own and manage the only professional football team to be allowed to play in the stadium; hence, neither the Board nor the Redskins in this case are performing a function that a purely government agency itself could have performed. On this basis we consider that the rationale justifying holding the federal antitrust laws inapplicable to the state action in *Wiggins* and *Ladue* is not a rationale which supports the position of the appellees here.

C. *Joint efforts to secure governmental action.*

Two cases relied on by appellees here have been cited almost as much as *Parker* v. *Brown* for the proposition that where state action can be found the application of the antitrust laws cannot.

In an opinion heavy with overtones of First Amendment rights, the Supreme Court in *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*,[28] legitimatized

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[28] 365 U.S. 127 (1961).

joint efforts by businessmen to influence legislative or executive action, holding that even actions designed to injure their competitors did not violate the Sherman Act.

> A construction of the Sherman Act that would disqualify people from taking a public position on matters in which they are financially interested would thus deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them.[29]

In *United Mine Workers* v. *Pennington*[30] a small mining company brought an antitrust action against larger mining companies and labor unions, alleging a conspiracy in violation of the Sherman Act, one of the objectives being to cause the Secretary of Labor to set unreasonably high wage rates and the ultimate objective being to put the small company out of business. The Supreme Court followed *Noerr* and held that "joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition."[31]

First Amendment rights following *Noerr* and *Pennington* were given their most expansive treatment in *United*

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[29] *Id.*, at 139.

[30] 381 U.S. 657 (1965).

[31] *Id.*, at 670. Without at this moment analyzing what the Congressional Act authorizing Kennedy Stadium does contain in the way of an antritrust exemption, we point out that *if* the Redskins had lobbied with Congress for a specific provision in the Stadium Act stating that in order to secure a long-term lease the stadium would be leased for professional football exclusively to one team, the activities of the Redskins in lobbying for such a provision would have fallen squarely within *Noerr* and *Pennington*, and clearly would have been valid as an exercise of First Amendment rights.

States v. *Johns Manville Corporation*,[32] where it was held that activities engaged in to influence the decisions of public procurement officials on product specifications so narrowly as to eliminate the products of competitors, "are constitutionally protected and cannot be the basis of a finding of violation of the antitrust laws, . . . regardless of the intent with which they were undertaken."[33] The Justice Department did not take an appeal from dismissal of the Johns Manville complaint by the District Court, and thus the rule of *Noerr-Pennington* was expanded to legitimatize combinations to influence the government's actions as a purchaser in the market, not only when acting in a sovereign legislative or regulatory capacity.[34] In the case at bar the government agency, the Armory Board, is not acting as a *purchaser* in the market, but rather as a *seller* of facilities in which football games can be played. If *Johns Manville* were binding precedent, the appellees' reliance on the *Noerr-Pennington* doctrine would be better placed. But even at the time of the *Johns Manville* District Court decision there were perspicacious observers[35] who predicted that the District Court opinion had given unwarranted scope to the *Noerr* doctrine and that ultimately application of the antitrust laws would prevail.

On the precise issue of *Johns Manville* the First Circuit in *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*[36] reached precisely the opposite result. For purposes of the appeal from the District Court summary judgment dismissing the plaintiff's treble damage antitrust complaint, the Court of Appeals assumed that the defendant

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[32] 259 F. Supp. 440 (E.D. Pa. 1966).

[33] *Id.*, at 453.

[34] *See generally* S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 160-162 (3d ed. 1968).

[35] *See* ANTITRUST AND TRADE REGULATION TODAY 87 (J. Scott ed. 1969).

[36] 424 F.2d 25 (1970).

Paddock had combined with architects and others to write the specifications for pipeless swimming pools bought by public agencies in a way that would exclude competitors. The plaintiff Whitten was in the same business as Paddock, and alleged damages by these acts of Paddock, which were contended to be in violation of the antitrust laws. Paddock defended on the valid governmental action theory of *Parker* v. *Brown* and the rationale of *Noerr-Pennington* that under the First Amendment its efforts to influence public officials could not be in violation of the anti-trust laws. In a carefully reasoned opinion Judge Coffin and the First Circuit rejected both rationales. In rejecting *Parker* v. *Brown* as binding precedent, the First Circuit stressed, "Our reading of *Parker* convinces us that valid government action confers antitrust immunity only when government determines that competition is not the *summum bonum* in a particular field and deliberately attempts to provide an alternate form of public regulation."[37] In rejecting the *Noerr* analysis as applicable, the Court of Appeals said,

> The key to this decision, . . . is the Court's heavy emphasis on the political nature of the railroad's activities and its repeated reference to the "passage or enforcement of laws." The entire thrust of *Noerr* is aimed at insuring uninhibited access to government policy-makers. . . . By "enforcement of laws" we understand some significant policy determination in the application of a statute, not a technical decision about the best kind of weld to use in a swimming pool gutter.[38]

The First Circuit also rejected *Pennington,* saying:

> The state legislatures, by enacting statutes requiring public bidding, have decreed that government pur-

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[37] *Id.,* at 30.

[38] *Id.,* at 32.

> chases will be made according to strictly economic criteria. Paddock is free to seek legislative change in this basic policy, but until such change is secured, Paddock's dealings with officials who administer the bid statutes should be subject to the same limitations as its dealings with private consumers . . . . We conclude, therefore, that the immunity for efforts to influence public officials in the enforcement of laws does not extend to efforts to sell products to public officials acting under competitive bidding statutes.[39]

In *Trucking Unlimited* v. *California Motor Transport Co.*,[40] the Ninth Circuit likewise declined to apply the *Noerr-Pennington* exemption. There trucking firms had united to oppose competitors' requests for certification with the California Public Utilities Commission and the Interstate Commerce Commission. The combine of trucking firms threatened to use its cumulative financial and legal weight to block any action by the regulatory Commission. The Ninth Circuit said:

> The fundamental reason for the *Noerr-Pennington* exception does not apply. It is not the function of the courts to determine whether laws restraining trade will be adopted or, having been adopted, whether they will be enforced; nor is this the function of an administrative agency engaged in adjudication, ... It would be pointless to limit the reach of the Sherman Act in order to protect the access of courts and agencies engaged in adjudicative functions to information and opinion relevant to determinations they have no power to make.[41]

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[39] *Id.*, at 33.

[40] 432 F.2d 755 (9th Cir. 1970).

[41] *Id.*, at 758-759.

The court in *Trucking Unlimited* apparently considered that an adjudicative agency was in a position similar to a governmental agency charged with procurement, as in *Paddock Pool.* In neither case was the governmental agency in a position to make governmental policy, it was obligated to carry out the policy as already made, hence the rationale of *Noerr-Pennington,* guaranteeing access of private parties in combinations which would otherwise be illegal under the antitrust laws to influence such agency simply did not apply.

Trucking Unlimited illustrates again that the determination that a state agency and state action are involved "is only the beginning of the inquiry." In this category of joint efforts to secure governmental action we are discussing belongs, of course, *Woods Exploration and Producing Co., Inc.* v. *Aluminum Company of America, supra,* already analyzed in full.

D. *Federal government regulation of business.*

We have deferred an examination of decisions relating to federal government regulation of business until last for several reasons. Both parties in the case at bar relied most heavily on the decisions involving state action. The Supreme Court decisions in *Parker, Noerr,* and *Pennington* contained over-broad language in regard to the effect of state action on the applicability of the antitrust laws, and, in our opinion, subsequent decisions in lower courts have not always fully taken into account the rationale behind those Supreme Court decisions. On the other hand, the decisions on the applicability of the federal antitrust laws where federal regulation of business is involved have always proceeded on a different basis. As has been observed,

> Each of the regulated industries presents a unique problem when its status under the antitrust laws needs definition or clarification. The Supreme Court

> has taken the position Congress has the responsibility of deciding the role of competition for each regulated industry. Therefore, each case is decided on the basis of the wording of the particular statute involved. . . . A detailed study of the legislative history and an assessment of the "pervasiveness" of the "regulatory scheme" set out in the particular statute are earmarks of each of the Court's opinions on the function of antitrust policy in regulated industries.[42]

While the leasing of public stadiums to professional sports teams is not a regulated industry, it should not be forgotten that that Stadium Act and the antitrust laws were both enacted by the same legislative body, *i.e.*, the U.S. Congress. Therefore, there arises a similar problem of determining congressional intent as to the applicability or non-applicability of the antitrust laws, as we frequently have in the case of a federal government regulated industry. And, as mentioned above, some of the cases relied on most heavily by both parties, *e.g.*, *Parker* v. *Brown*, have to do with state regulated industries. Therefore, it is clear that the way the Supreme Court and other courts have analyzed the applicability of the antitrust laws in federal regulated industries is highly pertinent to the analysis we make here of the Stadium Act, the applicability of the antitrust laws to that Act, and the action of the Armory Board taken thereunder.

In *Silver* v. *New York Stock Exchange*[43] the Court considered "the proper approach to this case, in our view, is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted. The Securities Exchange Act contains no express exemption from the antitrust laws

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[42] ANTITRUST AND TRADE REGULATION TODAY 241 (J. Scott & Rockefeller ed. 1967).

[43] 373 U.S. 341 (1963).

or, for that matter, from any other statute."[44] The Court therefore held that "the action here taken by the Exchange would clearly be in violation of the Sherman Act unless justified by reference to the purposes of the Securities Exchange Act,"[45] and that such relevant purposes did not require immunizing the Exchange from liability for treble damages.

In *United States* v. *Philadelphia National Bank*[46] the Court likewise declined to find that the antitrust laws (§ 7 of the Clayton Act) did not apply, in spite of the broad regulatory powers given the Comptroller of the Currency. This was followed by *United States* v. *First National Bank and Trust Co. of Lexington*,[47] in which the Court again held that bank mergers approved by the Comptroller are subject to antitrust laws and may be prohibited by § 1 of the Sherman Act. On the same day in *United States* v. *El Paso Natural Gas Co.*[48] the Court similarly held that Federal Power Commission approval of a utility merger does not render non-applicable the antitrust merger provisions of § 7 of the Clayton Act.

However, in the *Panagra* case[49] the Court found that "the Board is empowered to deal with numerous aspects of what are normally thought of as antitrust problems," that the "acts charged in this civil suit as antitrust violations are precise ingredients of the Board's authority,"[50]

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[44] *Id.*, at 357.

[45] *Id.*, at 364.

[46] 374 U.S. 321 (1963).

[47] 376 U.S. 665 (1964).

[48] 376 U.S. 651 (1964).

[49] *Pan American World Airways* v. *United States*, 371 U.S. 296 (1963).

[50] *Id.*, at 305.

and thus the complaint should have been dismissed.[51] Like other regulatory agency cases involving the applicability of antitrust laws, the *Panagra* decision was posited squarely on the particular statute under which the Civil Aeronautics Board operates; hence, this contrary result is by no means inconsistent with the Supreme Court's decisions in the other cited cases. As another example, in *United States* v. *Radio Corporation of America*[52] the Court held that the Federal Communications Commission had no authority to decide antitrust issues. The Federal Communications Act[53] explicitly makes the antitrust laws applicable to the broadcast industry.

The maritime industry operates under the power of the Federal Maritime Commission specifically to grant exemptions from the antitrust laws. This power is not to be exercised loosely, hence in *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien (Swedish American Line)*[54] the Court upheld the Commission regulation that shipping "conference restraints which interfere with the policies of the antitrust laws will be approved *only* if" the conferences can show that they are "required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act."[55]

From this review of recent regulatory agency cases involving the applicability or non-applicability of the antitrust laws, it clearly emerges that Congress knows how to

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[51] The Court construed the antitrust exemption to be only as broad as specified in the statute. "We, therefore, refuse to hold that there are no antitrust violations left to the Department of Justice to enforce." (At 305).

[52] 358 U.S. 334 (1959).

[53] 47 U.S.C. 151 *et seq.*

[54] 390 U.S. 238 (1968).

[55] *Id.*, at 243. (Emphasis supplied.)

spell out an exemption from the antitrust law when it wants to do so, *e.g.*, the CAB and the FMC, where the agencies give consideration to antitrust policy [56] but make the initial decisions themselves, and in contrast to proceedings in the Federal Communications Commission, where any action by the FCC is specifically open to antitrust challenge. When the Congress was dealing with football and other sports,[57] it passed a special statute which permits professional sports teams to negotiate for all league members for television rights, and provides that "[t]he antitrust laws . . . shall not apply to any [such] joint agreement . . . ." [58] It also reaffirmed the usual applicability of the antitrust laws to any other contract "by, between, or among persons engaging in, conducting,

[56] Two recent decisions of our court should be noted, although the issue of the non-applicability of the federal antitrust laws was not directly raised. In *Marine Space Enclosures, Inc.* v. *F.M.C.*, 137 U.S. App. D.C. 9, 420 F.2d 577 (1969), FMC approval of a contract between New York City and the New York Port Authority containing restrictive covenants was challenged. This court remanded the case to the Commission for further proceedings fully exploring the antitrust questions arising from the restraints in the contracts. It may be implied from this ruling that even though the antitrust laws do not invalidate contracts approved by the Federal Maritime Commission, and this contract was between government entities, yet the responsible governmental body, *i.e.*, the FMC, was required to give due consideration to national antitrust policy. In *National Aviation Trades Association* v. *C.A.B.*, 136 U.S. App. D.C. 367, 420 F.2d 209 (1969), this court had before it an airport management contract between Pan American Airways and the New York Port Authority, somewhat similar to that involved in *Wiggins Airways, supra*. The Federal Aviation Act requires the CAB to weigh the antitrust considerations, and hence this court reviewed the record supporting the Board's findings that the contract would not create a monopoly in violation of the national antitrust policy.

[57] Telecasting of Professional Sports Contests Act, 15 U.S.C. § 1291 *et seq.*

[58] 15 U.S.C. § 1291 (1961), as amended, 15 U.S.C. § 1291 (1966).

or participating in the organized professional team sports of football, . . . "[59]

III. *The District of Columbia Stadium Act and the Claimed Non-applicability of the United States Antitrust Laws*

The appellees make as part of their principal argument a claim that the provisions of the District of Columbia Stadium Act exempt the stadium lease from application of the antitrust laws. In support of this they point to the specific language of the Stadium Act and its legislative history.

A. *The Statute.*

The D.C. Stadium Act does provide in part:

> In order to carry out the purposes of this subchapter, the Board is authorized *without regard to any other provision of law,* . . .
>
> (1) to determine all questions concerning the use of the stadium . . .
>
> * * * *
>
> (8) *to rent or lease* from time to time for any of the purposes of this subchapter, all or any part or parts of the stadium . . . for such periods of time as the Board shall determine . . . .[60]

It is on the language "without regard to any other provision of law" that appellees primarily rest their case that the U.S. antitrust laws do not apply to a lease of the stadium for any purpose, including a lease requiring exclusive use by one professional football team for thirty years.

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[59] 15 U.S.C. § 1294.

[60] 2 D.C. Code § 1723. (Emphasis supplied.)

The appellees do recognize however, that the expression "without regard to any other provision of law" does not confer a limitless exemption. Deposition testimony considered by the trial court in ruling on the summary judgment shows that responsible officials of the Armory Board consider that operation of the stadium is subject to all the police, fire, and health regulations in the District of Columbia. Administrative practice is in accord with this interpretation. And counsel for the appellees on oral argument said that of course the Armory Board has no power to lease the stadium for an illegal purpose. Congressional statutes, we are told, and we agree, should not be interpreted so as to lead to absurd or obviously unintended irrational results.

But exemption from the criminal and public safety statutes is not the only result which might be characterized as irrational and therefore not intended. Certainly the strong policies against behavior deemed by Congress criminal or hazardous to public safety militate against any conclusion that in passing subsequent legislation Congress intended to authorize such conduct. Yet other statutes further policies so basic to our social structure that—in the absence of unequivocal exemption therefrom, either by specific statutory language or by a purpose to enforce other policies of equal or greater importance—it would be irrational to imply that Congress intended to authorize the conduct they prescribe. Preeminent among these are the antitrust laws, designed to preserve free enterprise by prohibiting restraints upon free competition.

Under the wording of § 1723 the Board is authorized without regard to any other provision of law to carry out the purposes of the subchapter, which are defined in § 1720 as "to provide . . . a stadium suitable for holding athletic events and other activities and events of a nature requiring such a facility . . . ." Of particular significance

to our analysis is subparagraph (3) of § 1723, which authorizes the Board to acquire property and equipment necessary to carry out these purposes "except that no contract for more than $3,000.00 shall be entered into for the purpose of this paragraph *without competitive bidding.*" (Emphasis supplied.)

This latter language indicates that Congress considered that the exemptive expression relied upon by appellees made it unnecessary for the Board to follow any specific competitive bidding regulations in letting ordinary contracts, and so, under this subparagraph, it was necessary to provide for the use of competitive bidding in letting *larger* contracts having a value in excess of $3,000.00. More than Congress' preoccupation with such regulations, however, this language indicates to us Congress' concern to preserve the competitive spirit in larger contract offerings, even at the expense of its declared goal of permitting the Board to operate the stadium as a private venture.

Consistent with this, it is difficult to understand: first, if Congress intended the phrase "without regard to any other provision of law" to embrace the antitrust laws, *why* it adopted an anti-free competition attitude in regard to the largest and most important contracts—for long-term rental—the Board was authorized to make, while carefully preserving competition by requiring competitive bidding on other contracts over $3,000.00; second, if Congress did intend to exclude the applicability of the antitrust laws, *why* it did not do so in language as clear and specific as that used to define the applicability of the competitive bidding statute.

There is simply no reference in the Stadium Act (or in its legislative history) to the antitrust laws specifically. We are not cited to any other federal statute with language comparable to that of the Stadium Act which has been construed to rule out the applicability of the antitrust laws.

B. *The legislative history.*

Looking at the legislative history of the Act, we find no support for the argument that Congress intended to place the activities of the Board under § 1723 beyond the pale of the antitrust laws. In fact, the inferences we gather from examining the legislative history point to the opposite conclusion.

A statement made by Senator Bible, the then Chairman of the District of Columbia Committee, when he was reporting to the Senate on an amendment to subparagraph (6) of § 1723, dealing with concessions in the proposed stadium, is relevant:

> The Committee felt that, inasmuch as the stadium is to be in the *nature of a private venture,* it was more desirable that the Board be *vested with the authority to make its own decisions* as to the letting of concessions, without making restrictions on the Armory Board. (Emphasis supplied.) [61]

This bit of legislative history indicates the motivations behind the drafting of the Stadium Act. Though in reality run by the Government, the stadium was to be in the nature of a private venture. It therefore follows that the Committee must have intended the stadium's operator, the Armory Board, to be free from the aegis of those regulations applying to government agencies which would hamper functioning as a private business. These would include competitive bidding and federal procurement regulations, but would not include the antitrust laws, to which private businesses *are* subject; hence, the strong inference that the expression "without regard to any other provision of law" was meant by Congress to refer only to regulations applying to government agencies.

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[61] 103 Cong. Rec. 13567 (1957).

In arguing for the conclusion that Congress did intend the Board's leasing activities to be exempt from the antitrust laws, the appellees stress that it was essential for the construction of the stadium and its subsequent profitable operation (it has not been profiitable) that the Armory Board enter into a long term lease with the Redskins football team, and that Congress knew this. In fact, it is fair to say on the congressional testimony that the stadium would not have been built without a long-term lease from both the Redskins professional football team and the Washington professional baseball team.

This is not to say, however, that the leases could not have been secured without the restrictive covenant giving exclusive rights with respect to any particular form of use, and the appellees concede that there is nothing in the legislative history which mentions the question of whether the Redskins or any other tenant would be given such a restrictive covenant. Whether the Redskins would have signed a thirty-year lease without such a restrictive covenant is entirely speculative, but it is fair to point out that appellants' argument that there is no place in the District of Columbia suitable for professional football other than Kennedy Stadium is uncontradicted, that the Redskins might have been faced with the alternative of having no access at all to Kennedy Stadium unless they did sign a long-term lease, and that the possibility of bringing in another professional football team of a competitive league could not have been excluded.

C. *Comparative importance of the policies behind the Stadium Act and national antitrust policy.*

We think it significant that in those cases where the antitrust laws were held *not* to apply there was a national or state policy of importance approximately equal to the antitrust laws involved. For example, in *Parker* v. *Brown* the state action was regulation of an important

agricultural product, and a state regulation completely consistent with the federal Agricultural Adjustment Act. In *Noerr* and *Pennington* the constitutional First Amendment rights formed the underpinning of the decision that the actions of the private parties there in soliciting governmental action were not in violation of the antitrust laws. Similarly, in the federal regulatory cases such as *Silver, Philadelphia Bank,* and others discussed above, there was a conscious or implied evaluation of the importance of the national policy reflected in the creation of the regulatory agency compared with that of the federal antitrust laws. The agency's responsibilities, the "pervasiveness of the regulatory scheme," the extent to which the agency itself was called upon to pass upon antitrust considerations, and the degree to which it had in fact done so as reflected in the record,[62] were all considered. Since the creation of the regulatory agency and the definition of its responsibilities stemmed from the same source as the antitrust laws, *i.e.,* the U.S. Congress, an effort was made to reconcile the possibly conflicting national policies. In almost every case there is a reiteration of the theme that repeal or immunity or exemption from the federal antitrust laws will not be lightly implied.

We suggest that the action of Congress in providing a public stadium for the District of Columbia, while a governmental act of considerable importance to this particular community, hardly rises to the same dignity or furthers as important policies as the action of Congress in regulating the securities exchanges, the national banks, oil and gas pipelines, aviation or maritime routes, and that if in the consideration of cases arising from those federal regulatory agencies it is necessary for the Supreme Court and other courts to examine the extent to which the anti-

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[62] *See, e.g.,* this court's decisions in *Marine Space Enclosures Inc.* v. *F.M.C., supra,* and National Aviation Trades Association v. *C.A.B., supra*

trust laws apply,[63] it is reasonable to hold here that we must find a definite, clearly expressed, specific intent of Congress to rule out the applicability of the antitrust laws to the acts of the Armory Board before such exemption can be granted.

On examination of the statute, the legislative history, the administrative practice, a comparison of the Stadium Act with other federal statutes referring or not referring to antitrust applicability, and the relevant cited cases, we do not find that the applicability of the federal antitrust laws has been excluded. We therefore hold that the validity of the thirty-year lease between the appellees Armory Board and Pro-Football, Inc., must be tested in accordance with the United States antitrust laws as usually applied to contracts between private parties. For trial on the merits in accordance with this opinion the judgment of the District Court is reversed and the case

Remanded.

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[63] As shown by the cited cases, the rule generally is that the antitrust laws *do* apply unless there is a specific exemption, as in the FMC or CAB cases; and, even in those, there must be a showing in the record that the regulatory agency has properly considered the antitrust implications in its decisions.

APPENDIX C

Judgment

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the judgment of the District Court appealed from in this cause is hereby reversed, and this case is hereby remanded to the District Court for a trial on the merits, in accordance with the opinion of this Court filed herein this date.

Per Curiam

For the Court:
NATHAN J. PAULSON
Nathan J. Paulson
Clerk

Dated: April 27, 1971.
Opinion by Circuit Judge Wilkey.

APPENDIX D

STATUTES

SHERMAN ACT

§ 1, 15 U.S.C. § 1:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy [hereby] declared . . . to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2, 15 U.S.C. § 2:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 3, 15 U.S.C. § 3:

Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any

such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

DISTRICT OF COLUMBIA STADIUM ACT

§ 2, 2 D.C. Code § 1720:

In order to provide the people of the District of Columbia with a stadium suitable for holding athletic events and other activities and events of a nature requiring such a facility, the Armory Board (hereinafter referred to as the "Board"), created by section 2-1702, is hereby authorized to construct, maintain, and operate a stadium with a seating capacity of not to exceed fifty thousand, on a site in the District of Columbia determined in accordance with provisions of section 2-1721. In the event the Board exercises the authority vested in it by this section, such stadium shall be constructed substantially in accordance with the plans for such stadium contained in the Praeger-Kavanagh-Waterbury survey entitled "Engineering and Economic Study, District of Columbia Stadium" dated March 31, 1958. The Board is authorized to provide for the construction of such stadium by such means as it determines will most effectively carry out this subchapter (including, but not limited to, a negotiated contract).

§ 3, 2 D.C. Code § 1721:

The Secretary of the Interior is authorized and directed to acquire by gift, purchase, condemnation, or otherwise, all real property within the boundaries of the East Capitol Street site, as established in the first paragraph under the heading "(2) East Capitol Street Site" contained in the National Capital Planning Commission report entitled "Preliminary Report on Sites for National Memorial Sta-

dium" dated November 8, 1956, and thereafter, acting under authority of the Act entitled "An Act to establish a National Park Service, and for other purposes", approved August 25, 1916, as amended (16 U.S.C. § 1 and the following), the Secretary of the Interior shall enter into a contract with the Board for the construction, maintenance, and operation of the stadium (including the operation and maintenance of motor-vehicle parking areas) on such East Capitol Street site, except that such contract may be for a term of not more than thirty years. The Secretary of the Interior is authorized and directed to construct and prepare in areas A, C, D, and E only, on such site, as such areas are indicated on National Capital Parks Map numbered 1.7-146, motor vehicle parking areas, including driveways, walks, lighting, and landscaping, at a total cost not to exceed $2,660,000.

§ 5, 2 D.C. Code § 1723:

In order to carry out the purposes of this subchapter, the Board is hereby authorized without regard to any other provision of law, but subject to any contract entered into with the Secretary of the Interior under section 2-1721—

(1) to determine all questions concerning the use of the stadium for the purposes of this subchapter;

(2) to enter into contracts and agreements with the District of Columbia and the Federal departments, bureaus, establishments, and offices, and the Act of March 4, 1915, as amended (31 U.S.C. § 686), is hereby made applicable to such contracts;

(3) to acquire by purchase or lease, equipment, appliances, facilities, and property of any kind necessary or desirable to carry out the purposes of this subchapter, and to sell or dispose of any such property so acquired when in its judgment it shall be advantageous to do so, except that no contract for more than $3,000 shall be entered into for the purpose of this paragraph without competitive bidding;

(4) to make such structural and other changes in the stadium as it may deem necessary or desirable for carrying out the purposes of this subchapter;

(5) to light, operate and maintain motor-vehicle parking lots;

(6) to operate or contract for the operation of such concessions, including the checking of clothing and the sale of beverages and food as the Board may deem appropriate to the purposes for which the stadium may be rented or leased;

(7) to furnish such services to renters, lessees, and other occupants of the stadium as in its judgment are necessary or suitable for carrying out the purposes of this subchapter;

(8) to rent or lease from to time for any of the purposes of this subchapter, all or any part or parts of the stadium including any or all structures, equipment, or facilities of the stadium, at such rental values and for such periods of time as the Board shall determine;

(9) to carry public-liability insurance protecting the Board, and the members, officers, and employees thereof engaged in operating and maintaining the stadium, and in operating and maintaining the motor-vehicle parking areas in connection therewith; and to require tenants or lessees of the stadium to carry public-liability insurance protecting the interests of such tenants or lessees;

(10) to accept the gratuitous services of such persons as may volunteer to aid in the conduct of its activities.

(11) to enter into contracts, contingent or otherwise, for expert, professional, and other personal services, and for printing, engraving, supplies, or any items or services necessary and incident to the preparation and sale of bonds, to be paid out of the proceeds of the sale of such bonds.

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IN THE

Supreme Court of the United States

No. 71-121

PRO-FOOTBALL, INC., NATIONAL FOOTBALL LEAGUE, District of Columbia Armory Board, et al.,

Petitioners,

v.

NORMAN F. HECHT, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENTS' MEMORANDUM IN REPLY

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August 23, 1971

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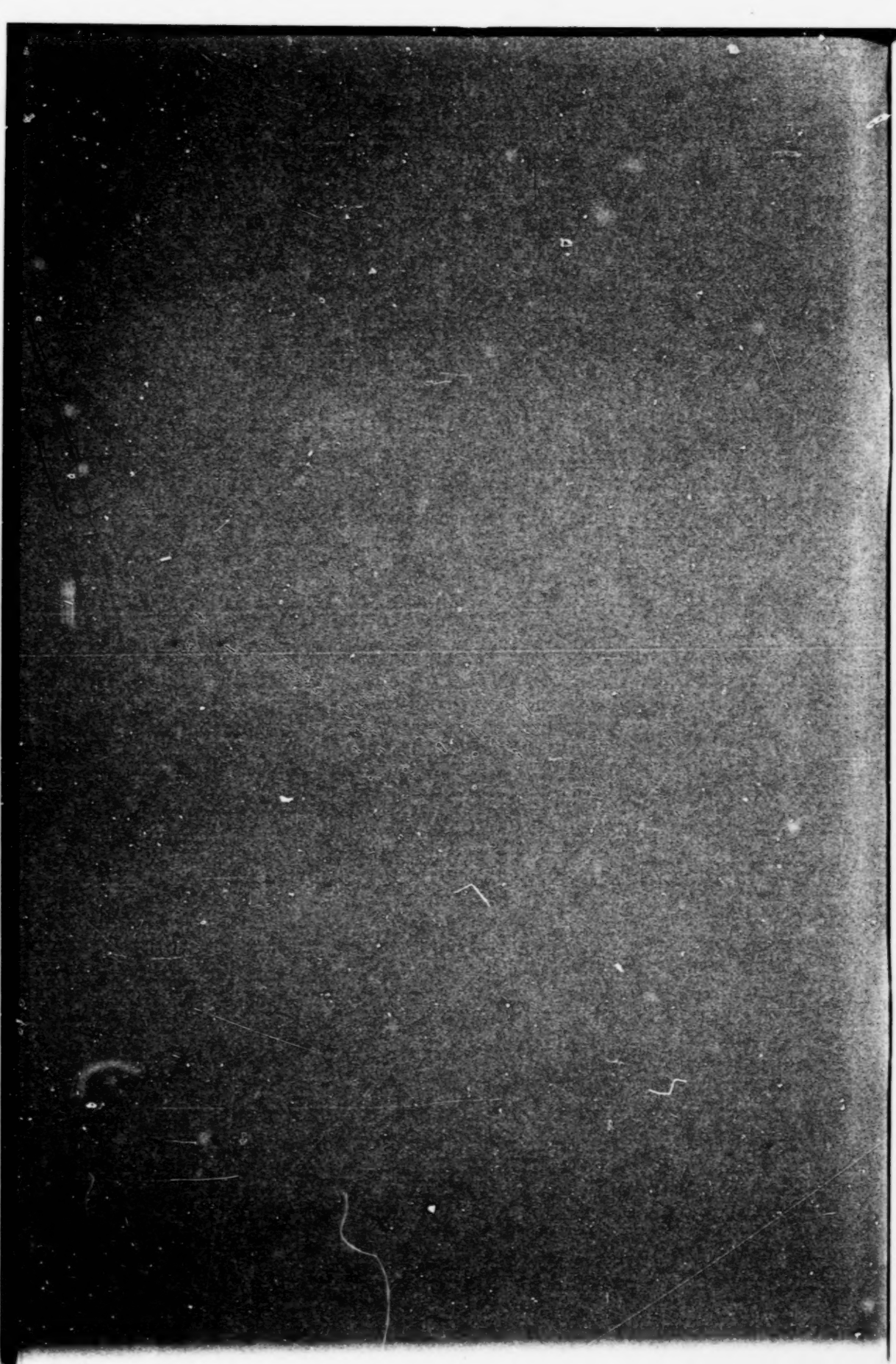

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RESPONDENTS' MEMORANDUM IN REPLY

OPINIONS BELOW

The opinion of the District Court (App. A of Petition pp. 1a-10a) is reported at 312 F. Supp. 472. The opinion of the Court of Appeals for the District of Columbia Circuit (App. B of Petition, pp. 11a-43a) is not yet reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether commercial dealings between private parties and government entities, such as the restrictive covenant in the lease agreement between the Redskins and the Armory Board, which prohibits the use of John F. Kennedy Stadium by any other professional football team for 30 years, is immune from the antitrust laws under the valid governmental action doctrine, merely because a government agency is a party to the commercial dealing, or under the provisions of the District of Columbia Stadium Act.

STATUTES INVOLVED

The pertinent provisions of the Sherman Act, Sections 1, 2 and 3 and of the District of Columbia Stadium Act are set forth in the Petition, Appendix D, pp. 45a-48a.

STATEMENT

Respondents are three local businessmen,[1] who in June 1965 had assemble a group of Washington businessmen to purchase an American Football League franchise for the District of Columbia. A written offer to purchase a franchise for $7,500,000.00, contingent upon the group obtaining the use of John F. Kennedy Stadium for the exhibition

[1] Respondents are Norman F. Hecht, who was a branch manager of Public National Bank and is now Vice President of Madison National Bank and director of American Investment Corporation, an investment and real estate management company in the Washington area; Harry Kagen, who is an owner and operator of a large volume downtown liquor store and is active in real estate investments; and Marc Miller, who is engaged in real estate development and investments.

of home games, was forwarded to the Commissioner of the AFL in the form suggested by the Commissioner.

Respondents submitted a letter to the Armory Board offering to lease Kennedy Stadium on those Sundays, Friday and Saturday nights when the Stadium was not being used by the Redskins for the minimum guaranteed rent of $100,000.00 or 12% of the gross receipts, which is the same percentage paid by the Redskins. Respondents were advised that the Armory Board was prohibited from leasing the Stadium to them because of the restrictive covenant in the Redskins lease.

Respondents sought and received the assistance of the Secretary of the Department of Interior in their attempt to obtain the use of the Stadium. The Solicitor of the Department of Interior submitted an opinion to the Armory Board that the restrictive covenant in the Redskins lease was in violation of the antitrust laws. However, the Armory Board continued to adhere to the position that the restrictive covenant prohibited it from leasing the Stadium to another football team without the consent of the Redskins, which consent Respondents were unable to obtain. Kennedy Stadium is the only stadium in the District of Columbia suitable and available for the exhibition of professional football games.

The Armory Board operates the Stadium as would a private landlord. It was the intent of Congress as stated by Senator Bible, Chairman of the District of Columbia Committee, that the operation of the Stadium by the Armory Board was "to be in the nature of a private venture."[2] The Stadium Act reflects this intent by conferring on the Armory Board broad authority to act on behalf of the government as the landlord of Kennedy Stadium.

The Redskins engaged in arms-length negotiations with the Armory Board for approximately one and a half years before the Redskins finally signed the lease agreement dated

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[2] 103 Cong. Rec. 13567.

December 24, 1959.[3] In a memorandum to the Armory Board, the late Chester Gray, Corporation Council of the District of Columbia, advised that the late George P. Marshall, President of the Redskins, was demanding, as a condition of the lease, that the Stadium would not be leased to any other professional football team.[4] Thus, the Redskins obtained the inclusion of the restrictive covenant in the lease, paragraph II(e), which prohibits the use of the Stadium by any other professional football team, during the 30-year term, for the years 1961 through 1990, that includes the seven Sundays, fourteen Friday and fourteen Saturday nights and Thanksgiving Day, during the football season, when the Stadium is not used by the Redskins.

The language of paragraph II(e) of the lease provides as follows:

> "The Lessor shall have the right to lease or otherwise permit the use and occupancy of the Stadium during any period exclusive of such specific dates referred to herein for any purpose or purposes, (except provided in subsection (a) of this Paragraph II), including (but not limited to) school, college or other amateur or professional baseball, football and basketball games and, also, for such other use or purpose as a Lessor may determine, *provided that at no time during the term of this Lease Agreement shall the Stadium be let or rented to any professional football team other than the Washington Redskins.*"

Respondents filed their original complaint on October 21, 1966 and the second amended complaint was filed March 24,

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[3]Minutes of meetings of the Armory Board indicate negotiations were carried on between the Armory Board and representatives of the Redskins during thirteen meetings commencing on July 22, 1958 and ending December 22, 1959. Armory Board's Answer To Interrogatories, No. 3(b) filed 8/15/67.

[4]Armory Board admitted authenticity of Memorandum dated 4 May 1959 of Chester H. Gray, Corporation Council, deceased, Exhibit D to Plaintiffs' Request for Admission of Authenticity of Documents filed 8/25/67, in Stipulation of Armory Board filed 10/13/67.

1967. Respondents allege in Court I of the second amended complaint that the restrictive covenant in the Redskins lease on Kennedy Stadium constitutes a contract in restraint of trade in violation of Sections 1 and 3 of the Sherman Act, because the restrictive covenant foreclosed the Respondents from the use of a stadium facility essential to the operation of a professional football team in the District of Columbia, which prevented Respondents from obtaining an American Football League franchise and a Continental Football League franchise for the District of Columbia. In Count II, Respondents allege that the Redskins have furthered and effectuated their monopoly over professional football in the District of Columbia, in violation of Sections 2 and 3 of the Sherman Act, by obtaining the restrictive covenant and not waiving it and consenting to the use of Kennedy Stadium by the Respondents when the Redskins were not using it. In Count III, Respondents allege that the restrictive covenant has furthered and effectuated the conspiracy of the Redskins and National Football League to restrain and monopolize the business of professional football in the District of Columbia. Respondents seek treble damages and injunctive relief against the Redskins and National Football League and injunctive relief only against the Armory Board.

On May 7, 1968, the late Judge Alexander Holzoff denied cross-motions for summary judgment of Petitioners and Respondents on Counts I, II and III on the grounds that there were too many issues of fact to be determined and the case should be tried.[5] The Redskins and National Football League, joined by the Armory Board, and the Respondents renewed their cross-motions for summary judgment on January 15, 1970. The District Court granted Petitioners' motion for summary judgment, holding that the leasing of the Stadium by the Armory Board was valid governmental action and therefore was immune from the

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[5]Transcript of proceedings of May 7, 1968, pp. 65, 66, filed 7/13/70.

antitrust laws.[6] The Court of Appeals reversed and remanded the case to the District Court for trial on the merits, reasoning that the leasing of Kennedy Stadium by the Armory Board to the Redskins is not the kind of government action that is immune from the antitrust laws, and that Congress did not specifically exempt, nor was their any evidence that Congress intended to exempt, the actions of the Armory Board from the antitrust laws.

REASONS FOR NOT GRANTING THE WRIT

The reasons for not granting the writ of certiorari are: (A) the decision below is clearly correct; (b) the judgment of the Court of Appeals remanding the case for trial on the merits is interlocutory; (c) the decision below does not conflict with decisions of the Supreme Court; (D) the decision below does not conflict with other lower court decisions; (E) a prior petition for writ of certiorari was denied in a similar case; (F) the constitutional right to petition government officials involved in *California Motor Transport Co. v. Trucking Unlimited*, in which certiorari was granted (No. 70-92, O.T. 1971) is not involved in the instant case, and (G) there is no evidence of Congressional intent to exempt Armory Board activities from the antitrust laws.

A. THE DECISION BELOW IS CLEARLY CORRECT

After a thorough study of the decisions of the Supreme Court and pertinent lower court decisions, examination of the D.C. Stadium Act, legislative history and administrative practice, and a comparison of the Stadium Act with other

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[6]The District Court, in emphasizing the desirability of the Armory Board entering into a long term lease with the Redskins, failed to consider or deal with the fact that the restrictive covenant is not in the best interest of the public, that its effects are contrary to the purpose of the Stadium Act, and that it does not protect or promote the interests of the Armory Board (see footnote 10), or whether it was the kind of government activity that is immune from the antitrust laws.

federal statutes referring or not referring to antitrust applicability, the Court of Appeals held that the leasing of Kennedy Stadium to the Redskins by the Armory Board is not the kind of government action that is immune from Sections 1, 2 and 3 of the Sherman Act and that the 30-year restrictive covenant must stand the scrutiny of the antitrust laws. This decision of the Court of Appeals is consistent with the general reluctance of the Supreme Court to grant antitrust immunity because of the "indispensable role of antitrust policy in the maintenance of a free economy,"[7] and its repeated admonition that "immunity from the antitrust law 'is not lightly implied'."[8]

Government agencies, when grouped together, are the largest participant in our economy. If immunity from the antitrust laws is extended to the commercial activities and contracts between private parties and government agencies, merely because a government agency is a party to the commercial dealing, a very significant portion of our economy and a large number of its participants will be excluded from the protection of the antitrust laws. Such an exclusion would obstruct the goal of the antitrust laws to achieve a free and unfettered economy.

Application of the antitrust laws to commercial dealings between private parties and government agencies, not specifically exempt by statute, will not hinder the operation of government as the Petitioners argue. All levels of government, federal and state, have confirmed their commitment to promoting competition in commercial dealings by adopting and enforcing competitive bidding laws and regulations.[9]

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[7] *United States v. Philadelphia National Bank*, 374 U.S. 321, 348 (1963); see also *Northern Pacific Ry. Co. v. United States*, 356 U.S. 1, 4 (1958).

[8] *United States v. First City Nat. Bank*, 386 U.S. 351, 368 (1967), quoting from *California v. F.P.C.*, 369 U.S. 482, 485 (1962).

[9] See 41 U.S.C. §5; Federal Procurement Regulations generally; and D.C. Stadium Act, D.C. Code §2-1723(3).

The restrictive covenant is not required to protect either the interests of the Armory Board or the public, in fact, it is contrary to such interests.[10] Denial of immunity to the restrictive covenant in the Redskins lease will not infringe upon the application of the immunity of the valid governmental action doctrine to actions of government officials acting pursuant to federal or state government regulation of specific industries in the public interest,[11] nor will it infringe upon the application of immunity to the constitutional right of any party to petition government officials to influence the passage or enforcement of laws and regulations.[12] No provision in the Stadium Act specifically exempts, nor is there any evidence of Congressional intent to exempt the actions of the Armory Board from the antitrust laws. Thus the decision of the Court of Appeals, that is consistent with antitrust policy and economically sound, should stand.[13]

B. INTERLOCUTORY JUDGMENT

This case is not yet ripe for review by the Supreme Court because the judgment of the Court of Appeals remanded the case to the District Court for trial on the merits.[14]

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[10]The restrictive covenant limits the variety of teams the public can see perform and the number of games the public has the opportunity to attend. It prevents the maximum use of the Stadium and prevents the Armory Board from obtaining rent from a second team that would decrease the amount of money the Armory Board would need to borrow from the United States Treasury to pay the annual interest on the Stadium construction bonds.

[11]*Parker v. Brown*, 317 U.S. 341 (1943).

[12]*Eastern R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657 (1965).

[13]Note, Governmental Action and Antitrust Immunity, 119 U. Pa. L. Rev. 521 (1971).

[14]See Petition for Certiorari, App. C, p. 44a.

Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327 (1967). It has been the long standing practice of the Supreme Court not to issue a writ of certiorari to review an interlocutory judgment of a Circuit Court of Appeals, unless it was necessary to prevent extraordinary inconvenience or unless delay would as a practical matter defeat the right to any review at all.[15] Neither factor is present in this case.

In addition to the governmental action issue, the Petitioners and Respondents in their motions for summary judgment, raised several other legal issues concerning the theory and application of the antitrust laws, which have not yet been decided.[16] Thus, in the event Respondents were to prevail on this appeal and at trial, it is highly probable that this case will be before this Court again on a petition for certiorari. Cases should not be sent up for review in fragments in order to achieve effective judicial administration, to conserve judicial time and energy in this era of over crowded dockets and to eliminate delay, expense and harassment caused by interlocutory appeals.

C. NO CONFLICT BETWEEN DECISION BELOW AND DECISIONS OF THE SUPREME COURT

Petitioners assert that the decision of the Court of Appeals in the instant case is contrary to the decisions of the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943), *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,

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[15] *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *Cobbledick v. United States*, 309 U.S. 323, 324 (1940); *Slaker v. O'Conner*, 278 U.S. 188, 189 (1929).

[16] Motions for summary judgment filed by Petitioners and Respondents January 15, 1968 and November 20, 1967, respectively, raise the issues whether the 30 year restrictive covenant is a *per se* violation of Sections 1 and 3 of the Sherman Act and whether the Respondents had the requisite "business" or "property" that comes within the protection of the antitrust laws.

365 U.S. 127 (1961), and *United Mine Workers v. Pennington*, 381 U.S. 657 (1965). A careful reading of the opinions clearly reveals there is no conflict. Commercial dealings between private parties and government agencies, such as the leasing of Kennedy Stadium by the Armory Board to the Redskins, are not the kind of government action the Supreme Court has held to be immune from the antitrust laws.

1. *Parker* Exemption Not Applicable

In *Parker*, the Court was concerned with a suit brought by a packer of raisins to enjoin the operation of an agricultural marketing scheme based on an act passed by the California legislature authorizing state officials to establish programs for the marketing of agricultural commodities so as to restrict competition among growers and to maintain prices. The Court held that the State of California had the right to exercise its sovereign power to regulate an industry by reducing competition when it was for the public benefit and in the best interest of the industry. The Supreme Court exempted from the antitrust laws actions taken by state government officials to regulate the raisin industry pursuant to a mandate from the California legislature.

In the present case, the restrictive covenant in the Redskins lease is not the product of a government agency taking restrictive action to regulate an industry pursuant to a legislative mandate to restrain competition in the public interest. It is the product of arms-length negotiations for the use of a municipal stadium for a private commercial purpose between a private party and a government agency acting as the landlord. Thus, the decision of the Court of Appeals not to exempt the restrictive covenant from the antitrust laws, merely because the Armory Board is a party to the lease, does not conflict with the exemption granted in *Parker* to restrictive actions taken by government officials to regulate an industry pursuant to legislative authority.

The decision of the Court of Appeals follows the distinction made by the Supreme Court in *Parker* between the participation of a government agency in an agreement with a private party and state regulatory actions. The Supreme Court stated that "we have no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade,"[17] and then cited *Union Pacific R. Co. v. United States*, 313 U.S. 450 (1941), a case where the Court held that Kansas City had entered into a private agreement with the railroad company for the construction, operation and exclusive use of a railroad terminal in violation of the Elkens Act. Thus, in addition to there being no conflict between *Parker* and the decision of the Court of Appeals, the distinction made by the Supreme Court between commercial activity and state regulatory action was followed.

2. *Noerr-Pennington* Exemption Not Applicable

In *Noerr* and *Pennington*, the Supreme Court held that joint efforts of private parties to petition government officials in policy making positions to influence the passage or enforcement of a law or regulation or to persuade government officials to take certain action, are immune from the antitrust laws. These cases stand for the proposition that regulation of competition by the political process is legitimate and not proscribed by the Sherman Act, and that the first amendment right of the people to inform government officials of their desires with respect to the passage and enforcement of laws and regulations is paramount in our democratic form of government. As interpreted by the First Circuit Court of Appeals,[18] the thrust of *Noerr* and *Pennington* is aimed at insuring free access to public officials vested with significant policy making discretion. Neither

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[17] 317 U.S. at 352.

[18] *George R. Whitten, Jr. Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970).

in *Noerr* or *Pennington* did the Court extend the immunity to public officials engaged in purely commercial dealings similar to the facts in the present case. Thus, the decision of the Court of Appeals in this case, denying immunity to the commercial dealings between the Armory Board and Redskins in leasing Kennedy Stadium does not conflict with the *Noerr-Pennington* grant of immunity to political action.

D. NO CONFLICT WITH LOWER COURT DECISIONS

There is no conflict between the decision below and the decision of the Court of Appeals for the First Circuit in *E.W. Wiggins Airways, Inc. v. Massachusetts Port Authority*, 362 F.2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947 (1966) nor the decision of the Ninth Circuit in *Sun Valley Disposal Co. v. Silver State Disposal Co.*, 420 F.2d 341 (9th Cir. 1969), as the Petitioners contend. In *Wiggins*, the Court found that the Port Authority had been authorized to manage and operate the public airport by the Massachusetts legislature and in *Sun Valley Disposal* the state legislature directed the County Commission to provide trash and garbage disposal services. Instead of the Port Authority monopolizing the fixed base services and the County Commission monopolizing the trash and garbage disposal services, by purchasing equipment and hiring employees to perform the services, they each chose to contract with one private company, to act on their behalf to furnish the services their legislatures authorized and directed them to perform. The effect was that the private companies became the agents of the Port Authority and County Commission to perform the valid government services. The exclusive contracts did not create any additional restraint on trade beyond the monopolies the respective legislatures gave the Port Authority over the operation and management of the airport and the County Commission over the trash and garbage disposal service.

The thrust of *Wiggins* and *Sun Valley Disposal* is that exclusive contracts between a government agency and a private party for the performance of a service that the government entity itself has been given exclusive authority to perform by its legislature is valid governmental action immune from the antitrust laws. For example, in the present case, a part of managing a stadium is the operation of concession stands to provide food services for spectators. According to *Wiggins*, the Armory Board may either purchase the equipment and hire employees to provide the food services itself or contract with one company to provide the services, which is comparable to the Port Authority contracting with one company to provide fixed base operations to serve the airlines and passengers.

In neither *Wiggins* nor the present case did the legislatures grant either the Port Authority or the Armory Board the exclusive use of the airport for the operation of an airlines company or the exclusive use of the stadium to operate a football team. The First Circuit in *Wiggins* would have been faced with the identical fact situation that is before the Court in the present case if the Port Authority had entered into a lease with an airline company that prohibited the use of the airport by any other airlines and created a monopoly over air transportation in the Boston area. In a later case, *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970), the First Circuit indicated it would not have granted immunity from the antitrust laws to an exclusive lease between the Port Authority and an airlines company, when it dispelled the misconceived notion of total immunity for commercial dealings with government entities and adopted the view that commercial dealings between private parties and government entities are not immune from the antitrust laws merely because a government entity is a party.

The Armory Board in leasing the stadium to the Redskins for the exhibition of professional football games, was not

contracting with a private party to perform a service it was authorized by Congress to perform or contracting for the performance of a service that is part of managing and operating a stadium. Congress did not authorize the Armory Board to operate a football team or to use the stadium itself for the exhibition of sports events. Thus, the decision of the Court of Appeals in the instant case does not conflict with the decisions in *Wiggins* and *Sun Valley Disposal* and is consistent with the *Paddock* case.

E. PETITION FOR WRIT OF CERTIORARI DENIED IN SIMILAR CASE

The Supreme Court denied a petition for writ of certiorari to review the decision of the First Circuit Court of Appeals in *Paddock Pool Builders, Inc. v. George R. Whitten,* 400 U.S. 850 (1970), which decision was similar to the decision of the Court of Appeals in this case. In essence, the First Circuit held that actions of private parties and government agencies are not immune from the antitrust law when government agencies and private parties are engaged in commercial dealings, merely because a government agency is a party to the commercial activity. The First Circuit interpreted *Parker, Noerr* and *Pennington* as granting immunity only to government regulatory action and joint efforts to petition public officials in policy making positions to obtain the passage and enforcement of laws and regulations.

In *Paddock*, the Petitioner urged the Supreme Court to review the case because it contended that Parker established the broad general rule that valid government action in any context could not form the basis of private claims under the antitrust laws. In addition, the Respondent waived its right to file a brief in opposition to the petition and urged the Court to review the case because the application of the valid governmental action doctrine to government actions in commercial dealings was of major public importance. Yet, the Court denied certiorari.

If *Paddock* was not deserving of the Court's consideration, the present case is surely less deserving. In the instant case, the Court of Appeals not only interpreted the exemptions granted in *Parker, Noerr* and *Pennington* as did the First Circuit, but it also found that the provisions of the D.C. Stadium Act do not exempt from the antitrust laws the actions of the Armory Board in managing and operating the stadium.

F. WRIT OF CERTIORARI SHOULD NOT BE GRANTED FOR CONSIDERATION OF THIS CASE WITH *CALIFORNIA MOTOR TRANSPORT CO. v. TRUCKING UNLIMITED.*

The Court has accepted for review the Ninth Circuit decision in *California Motor Transport Co. v. Trucking Unlimited, cert. granted,* June 1, 1970 (No. 70-92, O.T. 1971). In this case a group of trucking companies conspired to conduct a program of opposing applications by competitors for operating rights before the state and federal commissions and the courts. The Ninth Circuit held that (1) the *Noerr-Pennington* immunity does not apply to concerted employment of judicial and administrative adjudicative processes as part of a scheme to restrain trade, and (2) that if the *Noerr-Pennington* immunity applies to judicial and administrative adjudicative processes, relief is not barred under the "sham" exception suggested in *Noerr,* if the real purpose of the judicial activity was to restrain competitors directly, rather than to restrain them indirectly by inducing restrictive government action. The primary issue presented for review by *Trucking Unlimited* is, whether the *Noerr-Pennington* immunity extends to judicial and administrative adjudicative processes, which involve the constitutional right to petition government officials provided for in the First Amendment. This constitutional issue is not involved with the question of whether commercial dealings between private parties and government agencies should be immune from the antitrust laws. Application of the antitrust laws to commercial deal-

ings of government agencies does not merit consideration with constitutional issues. The fact that the Court has decided to review the constitutional issues in *Trucking Unlimited* should have no bearing on the action taken by the Court on the present petition for certiorari.

The Fifth Circuit case, *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971) is pending in the Supreme Court on a petition for certiorari, No. 70-173. In this case the Fifth Circuit limited the *Noerr-Pennington* rule by making its applicability hinge on the truth or falsity, accuracy or inaccuracy of representations made to government agencies to induce government action. Here again the interpretation of the *Noerr-Pennington* rule is at issue which involves the constitutional right to petition. Thus, the action taken by the Court on the pending petition for certiorari in *Woods Exploration* should not effect the Court's disposition of the petition for certiorari in this case.

G. NO EVIDENCE OF CONGRESSIONAL INTENT TO EXEMPT ARMORY BOARD ACTIVITIES FROM ANTITRUST LAWS.

The D.C. Stadium Act, although passed by the United States Congress, is a local statute and the language in question, "without regard to any other law,"[19] has not been found in any other federal statute. The interpretation of this local statute, and specifically the interpretation of language which will have no bearing on other federal statutes or national policy, does not merit review by the Supreme Court.

In considering the provisions of the Stadium Act and its legislative history, the Court of Appeals found no Congressional intent to exempt the activities of the Armory Board

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[19] 2 D.C. Code Sec. 2-1723. See text in Petition, App. D, pp. 47a-48a.

from the antitrust laws. To the contrary, it found several factors that indicated Congress did not intend to exempt actions of the Armory Board from the Sherman Act.[20]

The interpretation of the Court of Appeals adheres to the expressed policy of the Supreme Court that when there are two Acts upon the same subject, the rule is to give effect to both if possible, and that repeal of the antitrust laws is to be implied only if necessary to make the provisions of the later Act work. *Silver v. New York Stock Exchange,* 373 U.S. 341 (1963); and *California v. F.P.C., supra,* 485; and *United States v. Borden Co.,* 308 U.S. 188, 198 (1939). The most reasonable interpretation of the pertinent language is that the authority of the Armory Board to manage and operate the Stadium is derived solely from the Stadium Act and not from any other laws, and that no other law is to affect the authority of the Armory Board to engage in any lawful acts necessary to construct, manage and operate the stadium, including entering into leases and contracts for lawful purposes under lawful terms and conditions. This interpretation permits the Court to give effect to both the cited language of the Stadium Act and the antitrust laws and to adhere to the policy that immunity from the antitrust laws, absent specific statutory provisions, is not lightly implied. The interpretation of the Court of Appeals should stand.

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[20]Petition, App. B, pp. 38a-41a.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 71-121

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

PRO-FOOTBALL, INC., NATIONAL FOOTBALL LEAGUE, DISTRICT OF COLUMBIA ARMORY BOARD, ET AL., *Petitioners,*

v.

NORMAN F. HECHT, ET AL., *Respondents.*

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REPLY BRIEF FOR PETITIONERS

Respondents set forth several contentions in opposition to granting the writ. To the extent that their arguments were not anticipated in our petition we reply below. At the outset, however, we note that respondents in their memorandum do not undertake to minimize the importance of the question posed by this case.[1] Indeed,

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[1] This statement is subject to one possible qualification. Under the heading "No Evidence of Congressional Intent to Exempt Armory Board Activities from Antitrust Laws," respondents seem to suggest that the case is of little consequence because it turns on the effect to be given to the phrase "without regard to any other provision of law," a phrase that is special to the D.C. Stadium Act. (Mem. 16-17). But the essential question posed is whether the antitrust laws are meant to be applicable to valid governmental action. That question arises in the context of the D.C. Stadium Act, which makes this case a stronger case than some other might be for holding the antitrust laws inapplicable. The existence of the Stadium Act context, however, does not lessen the significance of the question.

they point up its importance when they assert that "Government agencies, when grouped together, are the largest participant in our economy." (Mem. 7). Thus, it remains true, as respondents told the Court of Appeals (see Pet. 6), that the question presented here is of great importance because of its potential impact on the economy.

A. The Decision Below Conflicts with Decisions of This Court and the Courts of Appeals and Is by No Means Clearly Correct (Mem. 6-8, 9-14).

Decisions of this Court establish that "where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the [Sherman] Act can be made out." *Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 136 (1961); see *United States* v. *Rock Royal Co-op.*, 307 U.S. 533 (1939); *Parker* v. *Brown*, 317 U.S. 341 (1943); *United Mine Workers* v. *Pennington*, 381 U.S. 657 (1965). A consequence is that damage resulting proximately from such action cannot be recovered from a private party merely because he induced or participated in the action. See, *e.g.*, *United Mine Workers* v. *Pennington*, *supra* at 671.

Courts of appeals have applied the rationale of these cases to cover exclusive contracts between governments and private parties when negotiated and executed pursuant to proper authority. See *Sun Valley Disposal Co.* v. *Silver State Disposal Co.*, 420 F. 2d 341 (9th Cir. 1969); *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority*, 362 F. 2d 52 (1st Cir. 1966), *cert. denied*, 385 U.S. 947 (1966). Indeed, one court has gone so far as to hold that antitrust relief cannot be had against a private company for entering into questionable 35-year requirements contracts

because it was directed to do so by a government agency acting within the scope of its authority and discretion to secure a government loan to the company. *Alabama Power Co.* v. *Alabama Elec. Co-op., Inc.*, 394 F. 2d 672, 676-77 (5th Cir. 1968), *cert. denied*, 393 U.S. 1000 (1968).

The Court of Appeals in this case decided, contrary to the foregoing decisions, that a provision of a contract between a governmental agency, the Armory Board, and a private party, the Washington Redskins, permitting the Redskins to use Robert F. Kennedy Stadium, a public facility, subjected the parties to possible antitrust liability. It constructed a novel new doctrine calling for application of the antitrust laws to governmental action except where there is the most explicit Congressional direction to the contrary.

Respondents attempt on various grounds to distinguish the prior controlling cases and thus to establish that the decision below is correct and does not conflict with other decisions. Principally they urge that this Court's pertinent opinions mean less than they say. They also attempt to denigrate the status of the Armory Board and its function in managing Robert F. Kennedy Stadium.

As for the first point, it is necessarily for this Court to say what is the scope of the legal propositions established by its decisions. It is true that courts of appeals have lately brought into question the scope of the principle that valid governmental actions are not subject to the antitrust laws. See, *e.g.*, *George R. Whitten, Jr., Inc.* v. *Paddock Pool Builders, Inc.*, 424 F. 2d 25 (1st Cir. 1970), *cert. denied*, 400 U.S. 850 (1970); *Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F. 2d 1286 (5th Cir.

1971), *petition for cert. filed,* No. 70-173, O.T. 1971; compare *Gas Light Co. of Columbus* v. *Georgia Power Co.,* 440 F. 2d 1135 (5th Cir. 1971), *petition for cert. filed,* No. 70-290, O.T. 1971; *Washington Gas Light Co.* v. *Virginia Elec. & Power Co.,* 438 F. 2d 248 (4th Cir. 1971). But that is a reason for granting certiorari to resolve the question that has been opened. Review should not be denied on the basis of a litigant's view that novel doctrine enunciated by a court of appeals can somehow be reconciled with what this Court has ruled. We suggest that this Court may have recognized the desirability of resolving the question when it granted the petition for certiorari in *California Motor Transport Co.* v. *Trucking Unlimited,* No. 70-92, O.T. 1971.[1]

As for the respondents' other principal point, we would say only this: The Armory Board is an undoubted agency of government, created by Congress and of equal dignity with any other governmental agency so far as the courts are concerned. In negotiating the terms of the lease of Robert F. Kennedy Stadium to the Redskins, the Board was acting in its own interest as a public agency. It was engaged in

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[1] Respondents attempt to distinguish the Court's granting review in *Trucking Unlimited* on the ground that that case involved the First Amendment right to petition the government. (Mem. 15-16). Only one of five questions presented in the petition in that case, which the Court granted without limitation, is addressed to the First Amendment issue. The Court's earlier denial of certiorari in Paddock Pool Builders, Inc. v. George R. Whitten, Jr., Inc., 400 U.S. 850 (1970), is not a reason for denying certiorari here, as respondents urge. (Mem. 14-15). We have no way of knowing what moved the Court in that case not to grant certiorari, but it is a fact that the conflicts in the lower federal courts over the question of the application of antitrust laws to governmental action were not so evident when that petition was passed upon as they are now. This case and the three cases in addition to *Whitten* cited at pp. 3-4, *supra,* were decided in 1971.

activity at the core of its statutory authority under the D. C. Stadium Act to construct, finance and manage the stadium. For "there would have been no stadium unless a long-term lease could be negotiated by the Armory Board with the Redskins." (Pet. 8a [District Court], 15a [Court of Appeals]).

The conclusion by the Armory Board of a lease of such significance to its statutory duties is a governmental action that certainly rises to the level of the actions of the Massachusetts Port Authority in *E. W. Wiggins Airways, Inc.* v. *Massachusetts Port Authority,* 362 F. 2d 52 (1st Cir. 1966), *cert. denied,* 385 U.S. 947 (1966), or the Clark County Commission in *Sun Valley Disposal Co.* v. *Silver State Disposal Co.,* 420 F. 2d 341 (9th Cir. 1969). It will not do to say, as respondents do, that the exclusivity provision of the Armory Board's stadium lease is not parallel to the exclusive contract in *Wiggins* because a fixed-base operator at an airport is different from a football team. In each case the action is that of an agency on which a legislature has conferred discretionary authority to manage a public facility. The antitrust laws are inapplicable to transactions that directly result from the exercise of that authority regardless whether the subject matter is the use of a stadium to play professional football or the use of an airport facility to pump gasoline into airplanes.

B. The Judgment Below Is Ripe for Review on Certiorari (Mem. 8-9).

Respondents argue that certiorari should be denied because the judgment below, by which a grant of summary judgment was reversed, is not final. To be sure, lack of finality is a consideration that may affect the decision whether to issue a writ of certiorari to review a court of appeals judgment; indeed the non-final

nature of a judgment may be a sufficient reason in some cases for a denial of a petition. The case cited on this point by respondents in the text of their memorandum, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & A.R.R.*, 389 U.S. 327 (1967), is an unusual case in which the Court expressly said that it was denying certiorari for want of a final judgment. See also *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 257-58 (1916), cited by respondents in a footnote.[1]

This Court nevertheless has the unquestionable *power* to review non-final judgments of the courts of appeals and properly exercises the power where an important question of law is presented or there is a conflict between lower courts. *Hanover Star Milling Co.* v. *Metcalf*, 240 U.S. 403, 408-09 (1916); *Forsyth* v. *Hammond*, 166 U.S. 506, 514-15 (1897). Both factors are present here.

The Court, moreover, has a long-standing policy of granting certiorari in a case that otherwise calls for review even though that case has been remanded for trial where the remand is based on a decision on a point of law that is "fundamental to the further conduct of the case." *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945). See *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 153 (1964); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685 n. 3 (1949); *Land* v. *Dollar*, 330 U.S. 731, 734 n. 2 (1947). Certainly the question of the applicability of

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[1] Respondents' other footnoted citations are inapposite. Cobbledick v. United States, 309 U.S. 323 (1940), deals with the requirement of finality for an appeal from a district court to a court of appeals. Slaker v. O'Connor, 278 U.S. 188 (1929), states the well-known rule that this Court's jurisdiction on appeal from the courts of appeals extends only to final judgments.

the antitrust laws is absolutely fundamental to this case, since the case will end without further protracted litigation if the Court of Appeals is found wrong.

Finally—and this, we submit, should be conclusive—*Trucking Unlimited* v. *California Motor Transport Co.*, 432 F. 2d 755 (9th Cir. 1970), *cert. granted*, No. 70-92, O.T. 1971 (June 1, 1971), is in exactly the same procedural status as this case. There a district court dismissed a complaint for failure to state a claim. The court of appeals reversed and remanded for trial. This Court apparently concluded that the antitrust issue posed in that case was sufficiently important to warrant the grant of certiorari in the absence of a final judgment. The same conclusion is compelled here. For each case poses a highly significant dispute over the interpretation of the same line of currently controversial cases.

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